FINAL REPORT
OF THE
COMMISSION OF INQUIRY
INTO WAGE PROTECTION
IN INSOLVENCY SITUATIONS

Submitted to the
Minister of Labour
Government of Ontario

by
Donald J. M. Brown, Q.C.
Commissioner

October, 1985

Blake, Cassels & Graydon
Barristers, Solicitors, &c
Box 25, Commerce Court West
Toronto, Canada M5L 1A9

Telephone (416) 863-2400
Telecopier (416) 863-2653
Telex 06-219687
Direct Dial 863- 2512
Our Reference:

October 23, 1985

DELIVERED

The Honourable William Wrye
Minister of Labour
400 University Avenue
Minister's Office
14th Floor
Toronto, Ontario
M7A 1T7

Dear Sir:

Re: Commission of Inquiry into Wage Protection in Insolvency Situations

Please find enclosed my final report pursuant to the terms of reference established by the Minister of Labour on June 9, 1983.

Yours very truly,

Donald JM Brown

Donald J. M. Brown

DJMB/sm
Encl.

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CHAPTER ONE: EXECUTIVE SUMMARY

Introduction

On June 9, 1983 the Minister of Labour, the Honourable R.H. Ramsay, announced the establishment of this Inquiry with the following terms of reference:

1. To study and make recommendations with respect to the compensation of employees for non-payment of wages, including vacation pay, termination pay, severance pay and other benefit payments, consequent upon the bankruptcy or insolvency of their employers and, without limiting the generality of the foregoing, to study and make recommendations as to various remedial options including changes to legislative priorities for creditors, wage insurance plans, etc.
2. The study should take into account such factors as, feasibility of introduction and administration, economic impact, costs and means of financing, subrogation of employee claims, economic benefits, impact on payment of an employer's other debts and liabilities, possible scope of coverage and benefits, and any matter related to the foregoing.

3. In carrying out such study and making recommendations, government Ministries, financial institutions, employers, trade unions, and other interested groups or persons should be consulted.

Shortly after the commencement of this Inquiry, in September of 1983, the Federal Minister of Consumer and Corporate Affairs announced that the Federal Government was about to create a statutory priority for unpaid wages in cases of bankruptcy and insolvency, and introduced a newly-drafted provision known as Bill C-12 setting out the terms of a wage earners' 'superpriority'. As a result, the work of the Inquiry was suspended pending the enactment of the new federal legislation, and an interim report was rendered on December 13, 1983. Following the September, 1984 federal election, it became apparent that those proposed amendments to the Bankruptcy Act would not passed into law, and the Minister of Labour renewed the original mandate of this Inquiry.

Issues

The basic issue faced by the Inquiry was a simple one: should the Province of Ontario provide additional wage protection in the event of an employer's insolvency? Beneath the surface, however, lay a number of complex legal, economic and financial policy questions, as well as a variety of choices, all of which required analysis, quantification and evaluation.

The fundamental legal issue was to determine the extent to which a Province could pass legislation to provide wage protection in these circumstances, given Section 91(21) of the Constitution Act, 1867,[1] which confers legislative power on the Federal Government to make laws in relation to "bankruptcy and insolvency".

The basic practical task was to identify and quantify the extent of unpaid wages in circumstances of insolvency and bankruptcy. That exercise, in turn, required an identification of existing wage protection laws, and an assessment of their effectiveness.

The provision of effective wage protection and the extent of that protection necessarily raised such issues as: Who should receive protection? Should it be provided as "social assistance" or "insurance"? What elements of wages should be protected? Should termination and severance pay be included? Should there be a monetary or other limit? And, how important was speedy relief?

The question of how to provide effective wage protection required an analysis of the various techniques available, including compulsory insurance, directors', officers' and employers' personal liability, enhancing security or establishing greater priority for unpaid wages, as well as the establishment of an insurance fund. Each has potential drawbacks. An enhanced security interest for unpaid wages might adversely affect a business's ability to obtain credit. More payroll taxation might discourage investment and entrepreneurial activity. These disincentives, in turn, required analysis and evaluation.

Finally, the costs of providing additional wage protection required quantification and the basic question of who should bear the cost--employees, employers, creditors or Ontario taxpayers--required analysis.

Conclusions

The foregoing questions were addressed, and the following conclusions reached:

1. Ideally, the Federal Government should accept responsibility for legislation relating to wage protection in insolvency situations. In the absence of federal action, however, a province does have legislative competence and has open to it most of the techniques necessary to ensure that employees do not bear the loss of unpaid wages.
2. In many instances the present laws are ineffective in protecting employees from unpaid

wages, and a wide cash flow gap exists since unemployment insurance does not commence from the date of the last wage payment; rather, the "waiting period" of two weeks commences with the first day of unemployment.[2]

3. The extent of unpaid wages in 1982 - 83 was estimated to be not more than six million dollars, excluding unpaid fringe benefits, severance and termination payments not made. And while this figure is relatively minor, even if an estimate is added for unpaid fringe benefits, when viewed from the perspective of the annual budget of the Province, its impact on the individuals affected was substantial.
4. Accordingly, the following amendments to the Employment Standards Act[3] are recommended.

Recommendations

It is recommended that:

1. a new definition be created for "unpaid wages" for the purposes of these recommendations, which would not include separation and termination pay;
2. the existing provisions of the Employment Standards Act providing for prosecution of directors and officers (Section 60) should be supplemented by a summary civil procedure,

whereby 150% of unpaid wages are recoverable against such persons individually with prima facie proof of the claim made simply by the filing of the Employment Standards Officer's order;

3. Section 15 be amended so that the trust and lien for vacation pay not affect a security that attaches to an employer's fixed assets;
4. a new section be enacted, providing that upon an employee commencing employment, every employer shall be deemed to hold the employee's last three pay periods of wages in trust for the employee in terms that follow the language of Section 15;
5. a fund be established to be administered by the Director of Employment Standards, out of which claims of employees for unpaid wages and vacation pay could be paid;
6. the limit to claims from such a fund would be one year's accrued vacation pay and three pay periods of unpaid wages;
7. the Director of Employment Standards be subrogated to the rights of the employees for the purpose of realizing the trust and making claims against directors and owners;

8. the Director of Employment Standards be empowered to licence or authorize Trustees in Bankruptcy to act as his agent to facilitate speedy payment of unpaid wages;
9. the fund be paid for out of the Consolidated Revenue Fund or alternatively by increasing the Personal Property Security Act[4] registration fees for non-consumer security registrations;
10. as a supplementary matter, it is recommended that the Industrial Standards Act[5] be amended to provide for an industry-wide vacation pay trust fund for the garment industry to be administered by the industry's Advisory Committees.

The Remainder Of This Report

The following parts of this report develop the reasons for the foregoing conclusions and recommendations. They draw heavily upon the research prepared for the Inquiry, which is included as Appendices to the Report as follows:

Appendix I: THE ABILITY OF THE PROVINCE TO PROTECT WAGES: THE CONSTITUTIONAL ISSUES, by Simon C. Armstrong

II: WAGE PROTECTION IN OTHER JURISDICTIONS, by Jim St. John

III: PRESENT WAGE PROTECTION IN ONTARIO, by Maureen Kenny

IV: STATISTICAL ANALYSIS OF WAGE CLAIMS ARISING FROM ONTARIO BANKRUPTCIES, RECEIVERSHIPS AND OTHER INSOLVENCIES BETWEEN APRIL 1, 1982 AND MARCH 31, 1983, by Cary Swoveland

Meetings were held with interested parties including representatives from financial institutions, employers, and trade unions. Also, professional organizations including the Canadian Bar Association and the Association of Trustees in Bankruptcy, provided assistance and advice to the Inquiry. A listing of those with whom meetings were held is included as Appendix V. Michael Skolnik of the Ontario Institute for Studies Education, and David Murray of The Clarkson Company, were retained as special consultants to assist in the analysis and evaluation of the data presented.

Chapter One: Notes

1. *The Constitution Act, 1867*.

2. *The Unemployment Insurance Act, 1971*, S.C. 1970-71-72, ch. 48, as amended; Section 20.

3. *The Employment Standards Act*, R.S.O. 1980, Ch. 137.

4. *The Personal Property Security Act*, R.S.O. 1980 Ch. 375.

5. *The Industrial Standards Act*, R.S.O. 1980, Ch. 216.

CHAPTER TWO:

MORE EFFECTIVE WAGE PROTECTION IS REQUIRED

As indicated, this Inquiry recommends that the Province of Ontario enact legislation to increase protection for wage earners in instances of bankruptcy and insolvency. It has concluded that the present laws designed to protect wage earners are inadequate and that the inadequacy is sufficient to warrant legislative action. This chapter seeks to elaborate on the reasons underlining that conclusion and, as well, to address the question as to whether this matter ought to be left to the Federal Government. It deals with the following:

1. Wage protection laws in Ontario today;
2. The adequacy of wage protection laws;
3. Should the loss lie where it falls?;
4. Should the Federal Government act?

1. Wage Protection Laws in Ontario Today

Ontario wage earners are not unprotected at the present time. There are both Federal and Provincial statutes which contain provisions designed to secure the payment of unpaid wages, by establishing some priority for unpaid wages. Some create security interests, in one instance there is a fund to secure certain benefits, and a number of laws make directors and officers personally responsible for unpaid wages owing by a corporation.

i) Existing Priorities for Unpaid Wages

Section 14 of the Employment Standards Act provides that each employee's wages to a maximum of $2,000.00 per employee shall have priority to the "claims or rights including the claims or rights of the Crown of all preferred, ordinary or general creditors..." except where the Bankruptcy Act[1] operates. In instances where the Bankruptcy Act operates, Section 107(1) of that Act establishes a preference for unpaid wages to the extent of $500.00 per employee. In neither case, however, does an employee's unpaid wages have priority over any secured creditor's interests in the employer's assets.

ii) Existing Statutory Security

In addition to the Employment Standards Act provisions establishing a preference for unpaid wages, some wages are secured by virtue of a statutory trust or a lien against an employer's assets. For example, Section 15 of the Employment Standards Act secures unpaid vacation pay by creating such a statutory trust and lien. Furthermore, the enforcement procedures of the Act under the direction and control of the Director of Employment Standards enhance realization of those claims. Similarily, the Pension Benefits Act[2] creates a trust for an employee's contribution to a pension plan and, in Ontario, employees in the construction industry have their wages protected by both a statutory trust and a lien by virtue of the provisions of the Construction Lien Act[3].

Federal legislation also uses the security technique. Under the Bank Act,[4] when an employer borrows money from a bank and the loan is secured by a "Section 178 security", the borrower's employees are protected to the extent of three months' wages as a condition of the security interest being created.

iii) Wage Protection Funds

At present there is no general wage protection fund in Ontario. However, by Section 30 of the Pension Benefits Act, a pension benefits guarantee fund is established to guarantee certain benefit payments when a "defined benefit" pension plan is wound up.

iv) Directors' Liability

The fourth type of wage protection commonly encountered is legislation which makes individuals liable for a corporate employer's debts to its employees. In

Ontario, directors of corporate employers are made liable personally for unpaid wages and benefits by the Employment Standards Act, the Pension Benefits Act and the Ontario Business Corporations Act.[5] As well, the Canada Business Corporations Act[6] contains a similar provision for directors' liability.

2. The Adequacy of the Wage Protection Laws

On its face, the array of legislation designed to protect wages might seem to be sufficient. All of the techniques commonly used to provide wage protection are employed. In practice, however, the protection afforded to wage earners is far from adequate.

Somewhat ironically, both the provincial and federal Crowns seem to have protected their interests in unpaid wages more adequately than the interests of the wage earners themselves. For example, the Workers' Compensation Act,[7] and the Health Insurance Act[8] use both a deemed trust and the technique of making directors of corporations personally liable. On the federal side, the Canada Pension Plan Act,[9] The Unemployment Insurance Act and the Income Tax Act[10] all use similar deemed trust techniques coupled with personal liability for directors to protect the federal Crown's interest in employees' wages, and a recommendation that this priority be strengthened was made in the latest federal budget.[11]

i) Wages are Subordinate to Secured Creditors' Interests

From the employee's perspective, however, the protection provided is largely illusory. The fundamental shortcoming of the above-mentioned legislation is that it is almost always subordinate to the claims of secured creditors. Both Section 14 of the Employment Standards Act, which gives a priority to wage earners in non-bankruptcy situations, and Section 107 of the Bankruptcy Act, which establishes a preference for wages owed to unpaid employees, do not take effect until after the interests of secured creditors are satisfied.

The one exception to this circumstance is the requirement under the Bank Act[12] that a secured creditor holding a Section 178 security must recognize the priority of an employee's claim to the extent of three months' unpaid wages. But even this protection can be circumvented by resorting to a general security agreement which permits banks to avoid the three months' wage priority if they choose to do so.

ii) Payment Is Not Speedy

The second basic shortcoming of the present legislative scheme is that it is not self-executing and does not provide a paycheque at or near the point when it is most required. While a specific study of the delays involved was not undertaken, the views of those persons consulted and interviewed was that it can be years and is almost always months before unpaid wages are realized.

iii) The Extent of Unpaid Wages

It became clear during the course of the Inquiry, however, that not every insolvency led to unpaid wages. Frequently secured creditors, particularly the chartered banks, kept employees' wages current and often paid employees' accrued vacation pay. At the same time, it was equally clear that this practice was not universal. A quantitative assessment of unpaid wages was undertaken covering the 12-month period ending March 31, 1983. In summary, the results were as follows.[13] For the one-year period April 1, 1982 through March 31, 1983, approximately 72% of the nearly 36,000 workers initially owed vacation pay were eventually paid; some 16,000 workers were owed wages of whom a little more than one-quarter collected. Approximately 15,000 workers were owed pay in lieu of notice, and 3,700 were owed severance pay.

In dollar terms, about $23 million in wages and vacation pay was initially outstanding of which all but about $6 million was eventually paid. By contrast, the claims for pay in lieu of notice and for severance pay together totalled nearly $31 million of which little, if any, was collected.

The claims for severance pay per employee were the largest, averaging about $3,200 per worker. The amounts that were pay in lieu of notice were less, averaging about $1,200 per worker. Lost wages and vacation pay both averaged about $300 per worker, although in a few cases there were instances of vacation pay and unpaid wages amounting to several thousand dollars.[14]

To extend this net amount of $6 million to include an estimate for unpaid fringe benefits which might have come to the fore if a fund had been in existence, it has been estimated that an additional $4 million would be more than adequate. This would increase the total estimate to about $10 million.

When viewed as a percentage of the Province of Ontario's gross provincial product for the same period, however, the ultimate loss, even including the estimate for lost fringe benefits, is minuscule. The same judgment would be made if the lost wages were compared to all wages paid by employers in Ontario for that period, which in 1983 amounted to $80 billion, or to the amounts of money expended as recorded by the 1983 Ontario budget, some $24 billion. Furthermore, the period surveyed occurred during an economic downturn and a similar analysis of business failures and lost wages today would likely result in smaller numbers both in terms of employees affected and in terms of the ultimate losses experienced. Thus, leaving aside "pay in lieu of notice" and "severance pay" and forgetting for the moment the time lag between the debts having arisen and payments made, the problem is relatively minor and very legitimately gives rise to the question: why should government do anything more?

3. Should the Loss Remain Where It Falls?

Apart from "pay in lieu of notice" and "severance pay", the size of the loss, even recognizing the possibility of it being understated,[15] is not such that it qualifies as a major social problem. Nevertheless, to the individual who misses a paycheque or two there can be a significant loss, without fault on his part, and without any means for either avoiding or insuring against it.

The critical fact to consider is that at present, employees are involuntary unsecured creditors of their employers. All other creditors are able to either obtain security, to insist on being paid C.O.D., or they can simply refuse to extend credit. None of those choices is available to employees. Employees cannot insist on payment in advance, nor as a practical matter can they obtain security for the payment of unpaid wages. By custom, in Ontario, to obtain and retain employment, employees must give their employers credit for wages earned until they become payable, usually at least to the extent of one pay period.

As well, in addition to being involuntary unsecured creditors, wage earners are placed in the unusual and highly undesirable position of having all their credit with one debtor. Whereas most other creditors will have a variety of debtors, an employee usually only has one job; his "eggs are all in one basket".

Furthermore, UIC benefits are not payable until a certain period of unemployment has elapsed. This gap in an individual's personal "cash flow" is widened by the non-payment of wages, and the bridging effect between wages and UIC which is often provided by the payment of accrued vacation pay is not there where loss of employment occurs in instances of insolvency.

Finally, even if an employee chose to protect himself or herself against the insolvency of his or her employer, it cannot be done. "Unpaid wage insurance" is simply not available in the insurance marketplace.

Thus, for the above reasons, the conclusion was reached that improved or more effective wage protection is warranted.

This conclusion was reached more readily by the fact that other provinces and nations have attempted to provide more adequate wage protection than presently exists in Ontario, thus avoiding the implications and problems that might arise if Ontario were required to lead the way. The European Economic Community countries and Ontario's two neighbouring provinces, Manitoba and Quebec, have insurance for unpaid wage claims.[16] British Columbia and Nova Scotia have created "superpriorities" for unpaid wages, and most states in the United States recognize some preference for the claims of wage earners. Accordingly, because of this widespread recognition of the need for wage protection, it is difficult to accept any suggestion that legislative action would cause investors to reduce their investments. In any event, it is difficult to justify preserving and attracting investment if it were preserved or attracted only in circumstances where employees were required to bear the loss of unpaid wages in the event of insolvency.

4. Let the Federal Government Provide the Wage Protection

Ideally, any further legislative action should be taken by the Federal Government. It has been given the express constitutional authority to legislate with respect to bankruptcy and insolvency. While this does not constitute a constitutional mandate to enact legislation, it is a recognition of federal responsibility. And, federal legislative action, as opposed to provincial action, would remove all doubts as to constitutional effectiveness of any wage protection measures that might be enacted by the province.

In the past ten years, however, while the Federal Government has appeared repeatedly to acknowledge the need for such action, it has done nothing. Since 1975, there have been six successive amendments to the Bankruptcy Act introduced in Bill form, of which two sought to create a superpriority for unpaid wages.[17] In addition, two federal reports were rendered, one by the Senate Banking Trade and Commerce Committee in 1980,[18] the other by the Landry Committee in 1981,[19] and both recommended the establishment of a wage guarantee fund.

One final consideration favouring federal legislative action is the fact that the Unemployment Insurance Commission has administrative machinery already in place, which, with the concurrence of the provinces, could be adapted to administer an unpaid wages insurance fund. Accordingly, from every perspective for the Federal Government to deal with the problem would seem to be the most appropriate course.

On the other hand, the Province has legislative authority to provide wage protection as long as it does not conflict with federal laws. And, given the absence of federal legislation, the Province is left with no alternative but to deal with the matter to the extent to which it is able.

Chapter Two: Notes

1. The Bankruptcy Act R.S.C. 1970, c. B-3, as amended.

2. The Pension Benefits Act, R.S.O. 1980, c .373, as amended.

3. The Construction Lien Act S.O. 1983, c. 6.

4. The Bank Act S.C. 1980, Ch. 40.

5. The Business Corporations Act, S.O. 1982, c. 4.

6. The Canada Business Corporations Act, S.C. 1974-75-76, c. 33, as amended.

7. The Workers' Compensation Act, S.O. 1984, c. 58.

8. The Health Insurance Act, R.S.O. 1980, c. 197.

9. The Canada Pension Plan Act, R.S.C. 1970, c. c-5, as amended.

10. The Income Tax Act, S.C. 1970-71-72, c. 63 as amended.

11. Federal Budget, 1985.

12. The Bank Act, S.C. 1980, Ch. 40.

13. C. Swoveland, Wage Claims Arising from Ontario Bankruptcies, Receiverships and Other Insolvencies Between April 1, 1982 and March 31, 1983, Appendix IV. Ex. 1, p. vi.

14. Ibid.

15. Ibid.

16 . Jim St. John, Wage Protection in Other Jurisdictions, Appendix II.

17. Bill C-60 (1975); (Bill S-11 (1978), the successor to Bill C-60, increased the maximums but left wage claims as unsecured payable in priority to other secured debts.); The subsequent Bills were Bill S-14 (1978), Bill S-9 (1979), Bill C-12 (1980), and Bill C-17 (1983).

18. Report of the Standing Senate Committee on Banking, Trade and Commerce, 1980.

19. Committee on Wage Protection in matters of Bankruptcy and Insolvency, Wage Protection in Matters of Bankruptcy and Insolvency (Landry Report), Canada, October, 1981.

CHAPTER THREE:

THE CONSTITUTIONAL LIMITS OF PROVINCIAL WAGE PROTECTION

With federal authority concerning bankruptcies and insolvencies explicitly provided for by the Constitution Act, 1867, the question of the scope of constitutional power of a Province to provide wage protection must be addressed. In a nutshell, the answer is that until the Federal Government acts, a substantial legislative authority exists. At the present time, the only restriction on provincial legislation would be the enactment of a scheme of priority that would conflict with either Section 107 of the Bankruptcy Act or Section 178 of the Bank Act, since those provisions represent the only exercise of the Federal Government's legislative power with respect to wage protection.[1]

1. The Double Aspect Doctrine

As earlier mentioned, by virtue of Section 91(21) of the Constitution Act, 1867, the Federal Government has legislative power in relation to matters of 'bankruptcy and insolvency'. On the other hand, a Province, by virtue of Section 92(13) of the Constitution Act, 1867 has the legislative authority to regulate 'property and civil rights', a head of legislative power which includes matters relating to employment and employees.

Legislation dealing with the payment of wages can fall within both the legislative power in relation to matters of 'bankruptcy and insolvency' and the power to legislate with respect of 'property and civil rights'. As such, it is a classic instance of what is known in constitutional jurisprudence as the 'double aspect' doctrine. That doctrine recognizes the possibility of either the federal government or a provincial government enacting valid legislation. By its terms, until the federal government acts so as to create conflicting legislation, provincial laws remain valid and operative. As the Supreme Court of Canada held in Multiple Access v. McCutcheon,[2] the "mere duplication without actual conflict or contradiction is not sufficient to envoke the doctrine of paramountcy and render otherwise valid provincial legislation inoperative". Thus, where legislation has a double aspect, (that is when it can be passed validly by either a province or the federal government), it will be valid when enacted by a province unless there is a clear and actual conflict between it and federal legislation. And, where the conflict is not complete, the provincial legislation will only be inoperative to the extent that it is in conflict with a federal law.[3]

2. The Limits of the Federal Bankruptcy Act

As noted above, the Federal Government has enacted very little legislation dealing with the subject matter of wage protection. The only legislation which represents a significant exercise of the federal legislative power in relation to bankruptcy and insolvency is the Bankruptcy Act, and only one provision in that Act deals with wage protection. Section 107(1)(d) protects "wages for services rendered during three months next preceding the bankruptcy to the extent of $500.00 ...", and accords them an unsecured but preferred status fourth in line after the claims of secured creditors.

Since federal legislation is paramount to provincial legislation, it would not be open to the Province to attempt to give unpaid wages a different priority in the distribution of assets following a bankruptcy.[4] Thus, the qualification contained in Section 14 of the Employment Standards Act which limits its operation to circumstances other than that of a bankruptcy, recognizes the extent to which the federal Bankruptcy Act has occupied the field.

The fact, as mentioned above, that the federal government has enacted some legislation in relation to wage protection, does not mean, however, that the provincial legislative jurisdiction is completely ousted.

As was held in Multiple Access v. McCutcheon, there must be an actual conflict or contradiction. Accordingly, the extent of the reach of Section 107(1) of the federal Bankruptcy Act must be considered.

In the first place, s. 107(1) of the Bankruptcy Act does not apply to all instances of insolvency. In many cases, creditors will appoint a receiver but do not petition the debtor into bankruptcy. Second, it does not apply to property not beneficially owned by a bankrupt. The Bankruptcy Act only seeks to apply to the bankrupt's estate. Therefore, where a bankrupt holds property "in trust" for another, that property does not form part of his estate and the provisions of the Bankruptcy Act do not apply to it. Third, it does not regulate the interests of secured creditors in property belonging to a bankrupt. By an express exclusion contained in Section 107(1), the rights of secured creditors are protected or rank ahead of the scheme of priorities established by that section.

The other federal Act which represents an exercise of the "bankruptcy and insolvency" legislative power is the Bank Act. By Section 178, it creates a security interest for unpaid wages to a maximum of three months' wages where loans by banks are secured by certain types of security. Thus, an attempt by a province to provide a security interest in the property referred to in

Section 178 for types of wages that were not included in the Bank Act definition of wages, i.e. severance pay or pay in lieu of notice, or to extend the security for more than three months, would be ineffective at least vis-à-vis the interest of the Section 178 security holder. Since the application of the Bank Act is limited to instances of realization of Section 178 security, and since there will rarely be circumstances where the proposed wage protection legislation will result in claims in excess of three months' wages, this legislation should be of no concern.

3. Statutory Trusts and Liens

Since the Bankruptcy Act excepts secured creditors from its scheme of priorities and does not apply to property which it is not part of the bankrupt's estate, the question arises: would the creation of a statutory lien in favour of employees or the creation of a statutory trust be operative in instances of bankruptcy?

The answer is not clear; however, it would appear that a "trust" will not be affected, whereas a statutory lien securing unpaid wage claims could be inoperative in instances where Section 107 of the Bankruptcy Act applies.

i) Statutory or Deemed Trusts

In the John M. Troup[5] case, the Supreme Court of Canada held that the trust provisions of the Mechanics'

Lien Act were competent provincial legislation authorized by the "property and civil rights" power allocated to the provinces under Section 92(13) of the Constitution Act, 1867 and were not in conflict with either the federal banking or bankruptcy legislation. The main issue in the case related to banking legislation, yet Mr. Justice Judson, who gave the principal majority judgment, asserted in the course of his reasons for judgment: "as to bankruptcy, a creation of the trust by Section 3(1) [of the Mechanic's Lien Act] does affect the amount of property divisible among the creditors but so does any other trust validly created".

Following this line of reasoning, the Ontario Court of Appeal has held that the deemed trust created by Section 15 of the Employment Standards Act has the effect of removing an employer's assets from the reach of the Bankruptcy Act. In summary, in In Re Phoenix Paper Products Limited,[6] the Court of Appeal held that:

1. Provinces can create valid trusts by legislation;
2. A "deemed" trust is enforceable in bankruptcy proceedings;
3. Section 15 of the Employment Standards Act creates a valid "deemed" trust for vacation pay;

4. By Section 47(a) of the Bankruptcy Act, property held in trust does not form part of the property of the bankrupt; and, therefore,

5. Since Section 15 of the Employment Standards Act creates a valid "deemed" trust within the meaning of Section 47(a) of the Bankruptcy Act, the trust property is not to be included as part of the "property of a bankrupt divisible among his creditors".

ii) Statutory Liens

The Supreme Court of Canada has reached a different result in two cases where provincial legislation sought to give Workers' Compensation Boards' claims the status of "preferred creditor" by enacting a stautory lien. In Re Bourgault,[7] the Court stated:

> "... (107)(1)(j) ends with the following words: notwithstanding any statutory preference to the contrary. The purpose of this part of the provision is obvious. Parliament intended to put all debts to a government on an equal footing; it therefore could not have intended to allow provincial statutes to confer any higher priority. In my opinion, this is precisely what is being contended for when it is argued that, because the Quebec statute creates a privilege on a movable property effective from the date of registration, the Crown thereby becomes a secured creditor and thus escapes the effect of the provision which gives it only a lower priority."

A more recent decision of the Supreme Court, however, dispelled the Court's earlier reliance upon the qualifying words "notwithstanding any statutory preference to the contrary". In its decision in Deloitte, Haskins and Sells Limited,[8] the Court held a provincial statutory lien in favour of the Workers' Compensation Board to be inoperative because it was in conflict with Section 107(1) of the Bankruptcy Act apart altogether from that phrase. The majority judgment, delivered by Wilson J. states:

> "It was not open to the claimant in bankruptcy to say: By virtue of the applicable provincial legislation I am a secured creditor within the meaning of the opening words of s. 107(1) of the Bankruptcy Act and therefore the priority accorded my claim under the relevant paragraph of s. 107(1) does not apply to me. In effect, this is the position adopted by the Court of Appeal and advanced before us by the respondent. It cannot be supported as a matter of statutory interpretation of s. 107(1) since, if the section were to be read in this way, it would have the effect of permitting the provinces to determine priorities on a bankruptcy, a matter within exclusive federal jurisdiction."[9]

4. Can Phoenix Paper be Relied Upon?

Obviously, a similar approach to that put forward by Madam Justice Wilson in Deloitte, Haskins and Sells Limited could be taken by the Supreme Court vis à vis a statutory trust. Indeed, other Courts of Appeal have adopted that approach.[10] However, given the Supreme

Court of Canada's position as set out in Troup and its later statements in Dauphin Plains[11], it is reasonable to expect that the conclusions reached by the Ontario Court of Appeal will be upheld. Dauphin Plains involved a receivership, not a bankruptcy, but in the course of the reasons, Mr. Justice Pigeon for the majority of Supreme Court stated that he found "the reasoning in Deslauriers wholly persuasive..." and Deslauriers involved a contest between a statutory trust and the application of the Bankruptcy Act.

There can be no doubt that an employee could agree with his employer to create a trust for unpaid wages, and have the trust property remain outside the bankrupt employer's estate. Accordingly, there is every likelihood that a trust, along the lines of the existing statutory trust provided by Section 15 of the Employment Standards Act, particularly if it was made part of every employee's contract of employment, would be operative and effective as a wage protection device.

The other techniques of wage protection, namely the creation of an insurance fund and the establishment of personal liability for directors and officers of corporate employers, do not give rise to constitutional issues. The validity of a provincial wage protection fund has not been judicially considered. However, since provinces have a clearly established authority over all aspects of employment, except in relation to federal undertakings, provincial legislatures are free to establish a fund to compensate employees for wage loss. Since such a fund would not be an attempt to disrupt priorities in bankruptcy but rather would only protect employees against the consequence of non-payment of wages, it is clear that the establishment of an insurance fund would not conflict with the present provisions of the Bankruptcy Act.

Similarly, legislation that establishes personal liability for directors and officers of corporate employers is within the provincial legislature's competence. It does not interfere with the operation or provisions of the Bankruptcy Act, since, in effect, such legislation forms a guarantee by third parties which has nothing to do with a bankrupt's estate.

Accordingly, by way of summary, under the Constitution Act, 1867 it is open to a province to provide wage protection in the following ways:

1. by creating an insurance fund;
2. by creating personal liability for directors and officers of corporate employers; and
3. by creating security for unpaid wages in the form of a "deemed" trust, that would be part of each employee's contract of employment.

Chapter Three: Notes

1. Apart, of course, from the possible conflict with federal legislation creating other priorities such as CPP and U.I. trusts for employee contributions deducted by employers.

2. Multiple Access v. McCutcheon (1983), 138 D.L.R. (3d) 1 (S.C.C.).

3. Deloitte, Haskins and Sells Limited v. Workers Compensation Board [1985], 4 W.W.R. 481 (S.C.C.).

4. Ibid; per Wilson J. at pp. 16-17.

5. John M. Troup, [1962] S.C.R. 487.

6. Re Phoenix Paper Products Ltd. (1983), 48 C.B.R. (N.S.) 113 (C.A.).

7. Re Bourgault (1979), D.L.R. (3d) 270.

8. Supra, note 3.

9. Ibid at p. 500.

10. Simon C. Armstrong, The Ability of the Province to Protect Wages: The Constitutional Issues, Appendix I p. 23 et seq.

11. Dauphin Plains v. Xyloid Ind. (1980), 108 D.L.R. (3d) 257 (S.C.C.).

CHAPTER FOUR:

THE EXTENT OF WAGE PROTECTION

1. Wage Protection: Insurance or Social Assistance?

Social assistance programs are directed to peoples' needs. While a "means test" may or may not be a feature of any specific form of social welfare or social assistance schemes, their rationale is the provision of a basic standard of living or care to people who otherwise could not achieve it. Insurance, on the other hand, whether it be "social insurance" such as O.H.I.P., or private insurance, seeks to spread risks and to compensate for "losses".[1]

There seems to be little doubt that the driving force of any wage protection plan is the latter; that is, to provide compensation for a loss. Unpaid wages are debts owing by an employer to an employee; they are the employee's "accounts receivable". While a secondary component of a wage protection scheme may be "deterrence", that is, the encouragement of wage payment, the fundamental goal is to replace lost property--the employee's earned but unpaid wages--not to ensure that some minimum standard of living can be maintained. Of course, there is a "social assistance" aspect to wage protection legislation, but fundamentally, it is enacted to prevent and to protect against property losses.

This categorization of wage protection as insurance rather than social assistance has implications for both of the extent of protection to be afforded by a wage protection program and for of who should finance it.

As to the extent of the protection to be provided, five fundamental issues arise:

1. Should the protection include vacation pay, pension contributions, and other fringe benefits?
2. Should severance and notice pay be protected?
3. Should there be a maximum or a minimum, or both, to any one claim?
4. Should the protection extend to "gross" wages?
5. Whose wages should be covered?

2. Vacation Pay and other Fringe Benefits

The first of these questions is relatively straightforward. Commonly, a wage package today consists of both a salary or hourly rate and a number of fringe benefits. Some, like vacation pay, are mandated by statute; others are simply part of the employment contract. In any event, as long as administrative problems do not outweigh the benefits of providing for fringe benefits protection, they ought to be part of the wage protection program.

An argument can be made that if a protection fund were to cover O.H.I.P., U.I., and C.P.P. premiums, all that would occur would be a transfer of funds from one program to another or from one government to another. To eliminate those payments for that reason, however, would be to confuse the issue of protection with "who should pay?". There is no good reason why the contributors to U.I. and C.P.P. generally should subsidize Ontario wage earners, or, more appropriately, those who ultimately provide that protection. The argument in the case of O.H.I.P. is less compelling in that it is an Ontario programme, but the same considerations apply. In any event, for consistency and simplicity, the payment of an employee's share of O.H.I.P. premiums ought to be included as part of the definition of "unpaid wages".

There may be instances where some other fringe benefits are more in the nature of "perquisites of office" which do not warrant protection. Rather than decide this matter in the abstract, however, it should be left for a period of administrative experience, after which time a decision can be made as to the need for a specific definition of which fringe benefits would be protected.

3. Severance and Termination Pay

A more difficult question is whether severance pay and pay in lieu of notice of termination ought to be included as items to be protected. To look to existing definitions of "wages" in related statutes to provide an answer begs the question. For example, "wages" under the Bank Act have been interpreted to exclude severance and termination pay, whereas Section 1(p)[2] of the Employment Standards Act as it now stands specifically includes both in its definition.

The conclusion that severance pay and termination pay be excluded from further wage protection legislation is based on the following three considerations, which are amplified below:

1. An employee's entitlement to severance pay and termination pay is not an absolute one, and the employer's obligation is not that of "paying a debt".
2. Both severance pay and termination pay would defer eligibility for U.I. benefits; and
3. To include severance pay and termination pay as part of a statutory trust for unpaid wages would impair the availability of credit by significantly altering the status quo concerning current practices by banks and other lenders.

A "severance payment" is not a payment that is an implied term of a contract of employment. It can only result from either a statute or an express provision in an employment agreement. Its features are that it is payable upon a severance of the employment relationship, usually initiated by the employer. It is generally computed in relation to years of service and is not set-off or reduced by an employer giving notice of termination of the employment relationship. It can be said to be a sort of "accrual of capital" in the job or perhaps a form of deferred receipt of benefits akin to accumulating unused "sick" days for which payment is made upon termination.

Severance pay is different from other types of compensation, however, in that it may not be payable in some circumstances. For example, if an employee resigns voluntarily, strikes, or is terminated for cause, commonly he will not be entitled to severence pay whereas he would be entitled to be paid any unpaid wages or vacation pay. Furthermore, it may be contingent upon the employee being one of a group terminated within a specific period, as is the case under the Employment Standards Act. In short, it cannot be said to have the same "debt" character as do unpaid wages and fringe benefits.

Pay in lieu of notice of termination is tantamount to the damages an employer must pay when an employment contract is breached by the employer failing to give adequate notice of the termination. It is an implied term of all employment contracts that they may be terminated by either party giving the other adequate or reasonable notice. What is reasonable depends upon a variety of factors, including the difficulty of the task, ease of obtaining re-employment, experience, age, seniority, and the like. In Ontario, the Employment Standards Act specifies statutory minimum notice periods varying with years of service.[3] Those notice periods are greater in cases of mass layoffs, presumably because mass layoffs throw a greater number into the same job market at once, thereby increasing workers' difficulty in obtaining new employment.

Pay in lieu of notice, however, is not "earned". The right to receive a certain amount of notice may depend upon years of service, but no monetary entitlement arises. If the appropriate notice is given, the employee gets nothing. Even if an employee does not receive notice, obtaining alternative employment will offset an employer's obligation.[4] Thus, while pay in lieu of notice is a payment made by an employer, it too is not a debt in the same sense as earned but unpaid wages.

That distinction alone, however, does not lead inexorably to the conclusion that protection should not be extended to severance and termination pay. Two further factors influenced that decison. One was the fact that payments in lieu of notice and severance payments will now defer an individual's entitlement to U.I. benefits.[5] Of course, this deferral would not necessarily result in a total offset. There are maximum benefits available under the U.I. scheme, and many employees earn higher weekly incomes than are provided thereby. On the other hand, by extending protection to these types of payment by means of a fund, either the Province or secured creditors will bear the cost which otherwise would, to the extent of U.I. benefits, be borne by the U.I. compensation fund.

Finally, as matters presently stand, rarely do insolvent employers or their creditors pay termination or severance pay following insolvency. This situation may be explained by the fact that, as has been discussed, these payments do represent a large portion of employee unpaid claims in the period studied totalling $31 million as opposed to $6 million in lost wages and vacation pay.[6]

Inclusion of these payments in any deemed trust was a great concern expressed during consultations with financial institutions, for two reasons. In the first place, many of the chartered banks have frequently paid unpaid wages and vacation pay to employees of an insolvent business. However, none made it a practice to pay termination or severance pay when they became involved in an insolvency. Thus, to make severance and termination pay part of a legislative scheme would be a radical departure from existing practices, which, in turn, would likely result in a reduction in credit to labour-intensive business.

Secondly, this tendency would be compounded by the uncertainty that exists as to the "quantum" of severance pay and termination pay that would be payable. Severance pay is payable only when fifty or more employees are terminated within a six-month period, and termination pay depends upon notice, the number of employees terminated and sometimes their length of service. In making allowance for the possibility of such payments reducing the lender's security, the uncertainty would likely be resolved by assuming a "worst case" scenario.

No attempt has been made to assess the possible extent of reduced credit. However, it would almost certainly lead to a reduction in jobs.

By contrast, providing a deemed trust that was limited to lost wages and fringe benefits would not likely cause financial institutions, at least the chartered banks, to change their assessments of credit worthiness. The practice of payment of unpaid wages is sufficiently established that most banks, if not all of them, would view such legislation as not significantly affecting the status quo.

Of course, there would be no credit impact if unpaid severance pay and termination pay were insured by a fund rather than covered by a trust. If that were done, however, it could increase the claims on a fund by as much as eight times and would certainly increase the risk of an employer deliberately not giving employees notice, knowing that an insurance fund would provide them with wages in lieu. Thus, the substantial increase in the cost of the fund and the increased "moral hazard" that would be associated with it, has led to the further conclusion that severance pay and notice pay be excluded from either form of wage protection.

4. Minimums and Maximums

The only justification for a minimum entitlement to unpaid wages, given the purpose of wage protection, would be an administrative one. Some claims could conceivably cost more to deal with than their face value. However, no such minimum has been placed on vacation pay claims under the Employment Standards Act, so until some evidence of excessive cost of collection is demonstrated, a minimum or a "deductible" is not recommended.

On the other hand, a maximum is required, not only to create some element of certainty for creditors in assessing the extent to which their security may be affected, but also to preclude what the insurance industry refers to as the "moral hazard". The overall acceptability and success of any proposed additional wage protection will depend in part upon the incidence of "unpaid wages" remaining at its present level. Employees must not be encouraged, by the presence of a fund, to continue working knowing that their employers cannot pay them. Thus, a "cap" must be placed on each employee's entitlement.

The cap can be a either monetary one,[7] a limit in terms of a period of employment,[8] or both. The disadvantages of a monetary limit are that it may go out of date with inflation, and it does not allow for varying levels of earnings. Furthermore, when creditors assess the value of possible future claims, a monetary "cap" quickly becomes the measuring stick rather than their making an actual assessment of payroll costs. For those reasons, it is recommended that a monetary cap not be imposed and that a "time period" be used to provide a maximum limit to claims.

This conclusion in turn raises the question: what time period is appropriate? Since the overriding concern ought to be to ensure that only "unavoidable losses" are protected, the period selected ought to coincide with the payment after which an employee knows that his wages are not being paid. Thus, by way of example, if cash were the method of payment and payment of wages occurred at the end of a "pay period", one "pay period" of protection would suffice. Often, however, a returned "NSF" paycheque will not occur until some time into a second or third pay period (but usually not later than that even where the pay period is weekly). Accordingly, it is recommended that wages and fringe benefits other than accrued vacation pay be protected for up to three pay periods, but in any event not to exceed two months in time.

A question can be raised as to "fringe benefits" other than vacation pay being so limited, since their payment by an employer may not coincide with "pay periods". For general ease of administration, however, our conclusion is that only the cost of providing up to "three pay periods" worth of those benefits ought to be protected, until actual administrative experience points to some other measure. Vacation pay protection ought to be limited to one year's entitlement.

5. Gross or Net Wages

Employees customarily only receive "net" wages. That is, their employer will have made deductions for income tax, U.I., C.P.P., Workers' Compensation and possibily O.H.I.P. and other premiums. Why insure or secure more than the "net" amount owing?

In the first place, the deductions are "wages" which otherwise are payable to the employee, and Dauphin Plains suggests that "wages" should not be defined in such a way as to exclude the portion of wages attributable to federal government deductions, C.P.P., U.I. and income tax. Second, as mentioned above, it is a disguised way of shifting the burden of the loss. Finally, such an attempt might be subverted simply by the federal government changing its current law or policy toward an employer's "notional" deductions for C.P.P., U.I. and income tax.

In the result, the conclusion is that the trust envisaged by these recommendations should extend to gross wages and the wage insurance fund should pay claims for gross wages, making and forwarding the same deductions as would the insolvent employer, which is the practice followed in Manitoba.

6. Whose Wages Should Be Protected?

One final consideration is who ought to be entitled to protection? At the present time the

Employment Standards Act affords protection to all "employees" as defined by Section 1(c) of that Act. Section 1(c) provides as follows:

> s. 1(c) "employee" includes a person who,
>
> (i) performs any work for or supplies any services to an employer for wages,
>
> (ii) does homework for an employer, or
>
> (iii) receives any instruction or training in the activity, business, work, trade, occupation or profession of the employer,
>
> and includes a person who was an employee.

There is no obvious reason why that definition ought to be modified. Accordingly, it is recommended that the additional proposed protection given to the same persons as it is at present, namely, "employees" as defined by the Employment Standards Act.

Chapter Four: Notes

1. See P.C. Weiler, Protecting the Worker from Disability: Challenge for the Eighties, Ontario Ministry of Labour, April 1983, p. 74 ff, for a discussion of these two social program models.

2. Section 1(p) of the Employment Standards Act defines "wages" as follows:

   s. 1(p) "wages" means any monetary remuneration payable by an employer to an employee under the terms of a contract of employment, oral or written, express or implied, any payment to be made by an employer to an employee under this Act, and any allowances for room or board as prescribed in the regulations or under an agreement or arrangement therefor but does not include,

   (i) tips and other gratuities,

   (ii) any sums paid as gifts or bonuses that are dependent on the discretion of the employer and are not related to hours, production or efficiency,

   (iii) travelling allowances or expenses,

   (iv) contributions made by an employer to a fund, plan or arrangement to which Part X of this Act applies;

3. Maureen Kenny, Present Wage Protection In Ontario, Appendix III.

4. Except perhaps to the extent of the minimums required under the Employment Standards Act since there is no concept of "mitigation of damages" under that Act.

5. S.O.R./85-288 under the Unemployment Insurance Act, supra.

6. See C. Swoveland, Statistical Analysis of Wage Claims Arising From Ontario Bankruptcies, Receiverships and Other Insolvencies, Appendix IV, p. vi.

7. e.g. $500 as is provided by Section 107(1) of the Bankruptcy Act.

8. e.g. up to three months' wages as provided by s. 178 of the Bank Act.

CHAPTER FIVE - THE SUGGESTED APPROACH

During the course of this Inquiry it became apparent that there were only three practical ways in which wage protection could be achieved:

1. requiring personal guarantees from employers including directors and officers of corporate employers;
2. providing security for the debt of unpaid wages; and
3. insuring against the loss through a wage insurance fund.

Some provinces require an employer to post a bond,[1] but this alternative is seriously flawed. Posting cash would be prohibitive to many and the cost of posting a bond to a thinly-capitalized employer would frustrate its purpose. These employers, the very ones with a risk of insolvency, would not comply, and enforcement would become both costly and difficult to achieve. Finally, in those situations where there was no compliance with the legislation, as in the case of compulsory automobile insurance, a sort of "unsatisfied judgment fund" would be necessary. By this result, bonding becomes little more than an employer-paid insurance scheme plus a fund, coupled with a costly structure of enforcement.

Furthermore, it became apparent that no single technique or form of wage protection would be appropriate; rather, the most desirable approach would be one that combined all three.

Each of the three above-mentioned techniques is used in some way in Ontario today. Therefore, to provide the comprehensive protection that is required would amount to no more than an extension and more complete application of each in such a way that each one would offset the disadvantages and untoward effects of the others.

1. Employers', Directors' and Officers' Liability

The theory of employers' personal liability for unpaid wages is based on the notion that employers must be seen as the party at fault in business failures. In the case of corporate employers, the officers and directors must shoulder that responsibility. Therefore, so the theory goes, if they so manage their businesses that wages are left "unpaid", they should be responsible personally.

The concept is not new. Not only is civil liability established by the Employment Standards Act but the directors of an employer company can be made criminally responsible as well.[2] Other statutes such as the Pension Benefits Act also include liability for officers of corporate employers. Similar provisions are found in both the Ontario and Federal Business Corporations Acts.[3]

For some unexplained reason, perhaps so as not to deter entrepreneurial activity, it would seem that these provisions have been enforced only sporadically. Yet, if liability were perceived as a more immediate threat, these provisions ought to result either in a reduction of the incidence of unpaid wages or in directors and officers purchasing liability insurance to cover that risk.

What is required is a reformation and consolidation of directors' and officers' liability under the Employment Standards Act, and a modification of the existing procedures to:

1. make officers as well as directors unconditionally liable for unpaid wages of corporate employers;
2. permit "class actions" by the Director of Employment Standards who would be subrogated to the rights of employees paid from the fund described below;
3. make the recovery "penal", in that 150% of the wage claim would be recovered, both to defray the costs of the fund and to deter non-payment;
4. permit the amount that could be claimed by the Director to be unlimited;

5. permit "proof" to be made by the filing of the Employment Standards Officer's audit statement and order;
6. permit the order to act as a certificate of pending litigation;
7. either utilize the existing speedy arbitration procedures of the Labour Relations Act or create a similar procedure under the Employment Standards Act to reduce the claim to judgment, which would then be enforceable as a judgment of the Supreme Court of Ontario.

One must be certain, however, that this remedy would not be abused. Accordingly, since a fund would exist, it ought not be available to creditors or to employees; rather, it should be available only to the Director of Employment Standards. In other words, the availability of this course of action ought to remain strictly within the control of the Ministry of Labour.

The inadequacies of this remedy are obvious. If the business is insolvent and the owners, directors or officers are insolvent, the "unpaid" wages will remain unpaid. While no attempt has been made to quantify this aspect of the matter, there is no doubt that such is often the case. As well, an action against officers, directors and others, will not result in a timely payment. As will be discussed more fully, to remedy those shortcomings, a fund is required. On the other hand, potential personal liability ought to exist to help ensure that employers do not use non-payment of wages to finance an insolvent business's continued operation because a fund exists that will compensate employees for unpaid wages.

2. Security For Unpaid Wages

Unpaid vacation pay is presently secured by means of a statutory or deemed trust, under Section 15 of the Employment Standards Act which provides as follows:

> 15. Every employer shall be deemed to hold vacation pay accruing due to an employee in trust for the employee whether or not the amount therefor has in fact been kept separate and apart by the employer and the vacation pay becomes a lien and charge upon the assets of the employer that in the ordinary course of business would be entered into the books of account whether so entered or not.

The trust, however, may not displace pre-existing security interests. It will only attach to an employer's unencumbered assets at the time the vacation pay accrues.[4] Thus, simply to add "unpaid wages" to Section 15 would not be effective since most assets would have become encumbered before unpaid wages arise. To be effective, the trust would need to be a deemed "security deposit" created at the time that an employee first begins employment. In this way, most employees will be adequately protected, since customarily a security on non-fixed assets "floats" and does not crystallize until the creditor holding the security seeks to realize upon it. Accordingly, the deemed trust commencing at the beginning of each employment relationship as a sort of security deposit largely ought to overcome this problem of a competing pre-existing security.

As well, to make it clear that the "deposit" was to provide a form of security for employees, the statutory language used should deem the trust to be a term of every employment relationship. And, to overcome the problem of multiple corporate ownership where a business's assets are held separately or the employer is an assetless provider of employees, a provision may be necessary incorporating a "user of an employment services", as well as the Income Tax Act "related company" provision, into the definition of an "employer".

Impact On The Availability of Credit

It is not likely that such a security technique would significantly affect the availability of credit or alter credit-granting practices, except perhaps where loans are secured by a charge or mortgage on the fixed assets. The factors which point to this conclusion are as follows:

1. There is no evidence that the existence of the present vacation pay trust has affected credit, and the amounts involved in that trust can be as significant as the amount of unpaid wages.
2. There is no evidence that credit to construction companies has been impaired by the existence of the statutory trust and lien contained in the Construction Lien Act.
3. Lending institutions acknowledge that their lending practices in British Columbia were not altered by the enactment of a superpriority for wages in that province.
4. Frequently, the chartered banks now pay wage arrears, and some do so with regard to unpaid vacation pay. Those banks who do so would not be adversely affected by the creation of a "trust" to secure wage payments.
5. The garment industry, which is a classic example of a high labour-content industry which might be potentially affected, has urged that a "superpriority" be enacted.

Thus, it seems clear that the creation of a trust to operate as a security deposit to secure wage payments is unlikely to affect adversely the granting of credit.

A subsidiary question was considered, namely, whether the trust should attach to all assets, both fixed and movable, or to non-fixed assets only. Concern was expressed that security in the form of a mortgage on plant and fixed machinery was often taken by lenders who, unlike the chartered banks, had no continuing relationship with the borrower, and were not organized generally to assess the extent of a business's prior commitments other than through the registry system. It was frequently noted that a mortgagee essentially relies on the value of the realty as security and develops the interest rate charged on that premise.

While no evidence exists that the trust for vacation pay has affected lending practices where the lender is taking back realty as security, one would not expect any, since the accrual of vacation pay has an annual limitation and such loans are usually for much longer than a year, and rarely would enforcement take place within the first year of the loan. In any event, the conclusion reached is that the trust for unpaid wages be subordinate to and displaced by any security interest in the "fixed assets" of the employer and that the trust for vacation pay be amended as well to not apply to "fixed assets".

The establishment of such a security deposit trust would shift the burden initially to those secured creditors whose security is in the form of non-fixed assets. This in turn gives rise to the question of which of several such creditors would bear the loss. Presumably, the same rules that are now applied in cases of the vacation pay trust would apply, so that the loss would be borne rateably on the basis of each creditor's unpaid debt.[5]

How Effective Would Such a Trust Be?

Obviously, such a trust will not provide an effective remedy where there are insufficient non-fixed assets. The study carried out indicates that some insolvent employers are in that situation.[6] Second, timely wage payment is not ensured by the enactment of a trust provision. These shortcomings can only be overcome by the establishment of a fund.

3. A Wage Fund

A wage fund would solve the problems of timely payments and the problem of inadequate assets, but could be expensive, particularly if it were to cause unpaid wages claims to increase significantly beyond the level existing in 1982-3.

There seems little doubt that those creditors who are now in the practice of funding an employer to enable wages to be paid would not be so inclined if a fund existed and if the cost of unpaid wages could be passed on in that way. As well, employers and employees would seek to keep a business going in the knowledge that a fund existed which would see wages paid. That this might happen is evidenced by the experience in jurisdictions where funds exist.[7]

Accordingly, in order to keep the incidence of unpaid wages at about its current level it is necessary both that the lending institutions continue in their past practices and that employers not seek to finance their insolvent businesses by not paying wages when they become due.

To achieve those objectives, the existence of a trust for unpaid wages is imperative. Additionally, the incidence of unpaid wages will be materially lessened if a penalty factor is attached. The penalty could be justified in terms of offsetting the costs of administration. It is therefore recommended that the penalty be secured by the trust, to the extent of 50% of the wages outstanding, and that it also be enforceable against employers, directors and officers of corporate employers.

Finally, speed of payment will not automatically result from the establishment of a fund. If the incidence of unpaid wages can be kept to its present proportions, however, that result can be achieved in two ways. The first would be through simple agency arrangements with licensed trustees. The second is to have the remainder of the claims dispensed through the existing machinery of the Employment Standards Branch. That proposal, however, leads to the further question: what would the administration of a fund add to its cost?

Administrative Costs

The cost of administration of a fund will not be insignificant. The Criminal Injuries Compensation Board administered awards of approximately $3,000,000 in 1983 and its administration costs were approximately 20% of that figure. U.I.C. costs are 8% of the amounts administered by it and the Workers' Compensation Board's costs of administration are approximately 14% of their total revenues.

It is estimated that the establishment of a fund will likely require the addition of thirty new personnel to the Ministry of Labour[8].

Accordingly, an overall net cost of approximately 10% of the monies administered corresponds favourably[9] with the cost of administering funds such as the Unemployment Insurance Commission and is what should be anticipated.

How much of this administrative expense will be recovered as a result of the 50% penalty and by way of civil suit against owners, directors and officers is difficult to assess and the initial study did not seek to quantify it. Obviously, in the case of most defunct businesses there will be no recovery and in most cases where there are assets, presumably wage arrears will not be permitted by those creditors or employers who risk being assessed the penalty.

Who Should Pay For The Fund?

There are several possibilities as to who should directly bear the cost of the fund:

i) employees;
ii) employers;
iii) creditors;
iv) the "public" through the Consolidated Revenue Fund (C.R.F.); or
v) some combination of the above.

In Manitoba,[10] the cost of the wage insurance fund is borne by the C.R.F. In Ontario, at present, the cost of vacation pay enforcement is borne by the C.R.F., but the cost of unpaid vacation pay is borne by the secured creditors whose security is displaced by the trust for vacation pay created by Section 15. Similarly, under the Bank Act, Section 178, the security holder bears the cost of unpaid wages at least to the extent that he is left with insufficient security to cover both the loan and unpaid wage claims.

The size of the fund, being relatively small, makes any sort of advance premium collection either from employers or employees not worth the cost of collection. For example, the cost of administering a premium collection scheme by the Workers' Compensation Board has been estimated at $1/4 million. As well, concern has been expressed over the imposition of another "payroll tax" which such a premium would constitute if paid by employers. The commonly held view is that the appearance of such a tax alone would be harmful to investment and entrepreneurial activity, beyond the extent of its actual impact.

For those reasons, it is recommended that neither an employer-financed nor an employee-financed fund be established. Rather, the fund would seem to be most appropriately financed from Consolidated Revenue, offset, if desired, by an increase in personal property security registration fees.

The present level of personal property security registrations in Ontario is estimated to be approximately 1.5 million annually. This includes all registrations, not simply those associated with business loans. If the annual cost of a fund was between $10,000,000 and $15,000,000, an increase in the fee from $4.25 to $15.00 would cover its cost, assuming that such registrations are relatively inelastic.

Chapter Five: Notes

1. J. St. John, Wage Protection in Other Jurisdictions, Appendix II, p. 60.

2. Employment Standards Act, supra, s. 59.

3. See Ontario's Business Corporations Act, supra, s. 137 and s. 250, the Canada Business Corporations Act, supra, s. 114 and s. 244, and the Pension Benefits Act, supra, s. 39(3).

4. See, for example, Board of Industrial Relations v. AVCO (1979), 98 D.L.R. (3d) 695 (S.C.C.), but c.f. National Bank of Canada v. Director of Employment Standards, (1983) 3 PPSA 119, where Prof. Swan held that a general security interest under the Personal Property Security Act could not be construed to permit the parties to contract out of the trust provisions of the Employment Standards Act.

5. See Bankruptcy Act, supra, s. 112.

6. C. Swoveland, op. cit., p. 63.

7. J.V. Gruat "Schemes for Guaranteeing Wage Claims in the Event of Bankruptcy", International Social Security Review, 1980, Vol. 33, No. 1, pp. 62-79.

8. Ontario Ministry of Labour, Management Planning Branch, unpublished memorandum, April, 1985.

9. Employment and Immigration Canada, Annual Report 1983-84, p. 48.

10. J. St. John, op. cit., p. 49 ff.

CHAPTER SIX: RECOMMENDATIONS

As indicated, it has been concluded that additional wage protection is required and that the Province of Ontario is constitutionally capable of providing it in each of the three ways discussed: by creating a trust; by establishing a fund; and by creating personal liability for employers, and for senior officers and directors of corporate employers. The general contours of each have been set out in the preceding chapter. More detailed recommendations follow.

The Extent of Protection

1. Definition of "Unpaid Wages"

To accommodate the conclusion that "unpaid wages" should not include severance pay and notice pay for the purposes of the security deposit, of the fund, and of enhanced employers' and directors' liability, a new additional definition will be required for the *Employment Standards Act* for the purposes of the trust and the insurance fund. It should follow the present definition, but exclude notice and severance pay. As well, this new definition should expressly include vacation pay, holiday pay and such fringe benefits as may be specified by Regulation.

2. Definition of Fringe Benefits

Because evaluation of fringe benefits may become administratively difficult, it should be done by Regulation to permit amendment as experience is gained.

There ought to be a provision identifying fringe benefits by name, so that categories and types can be listed. As an alternative, the Regulation should permit the Director of Employment Standards to set a percentage of wages to be paid in lieu of proof or calculation of actual fringe benefit losses.

Furthermore, there ought to be a power in the Director to establish different maximum periods for payment of fringe benefits as experience dictates.

3. There is no reason why all employees, as defined by the Employment Standards Act, should not be covered. Accordingly, no amendment to the definition of "employee" is recommended.

Statutory Trust and Lien For Unpaid Wages and Vacation Pay

4. As indicated above, a concern was expressed that security on fixed assets should not be affected by any "deemed" trust. Accordingly, it is recommended that an exception be drafted for Section 15 of the Employment Standards Act, excepting any fixed security interest attaching to fixed assets.

5. At the same time, a new section should be added, creating a security deposit equal to 150% of an employee's last three pay periods of unpaid wages, to come into effect upon the commencement of employment.

6. The language of this new provision ought to closely follow the language of the present Section 15, which creates the vacation pay trust, since Phoenix Paper has given judicial approval to that statutory form, and as well to deem the trust to be a term of every employee's contract of employment.

The Fund

7. A fund should be established to compensate employees for unpaid wages; its operation ought not be limited by an artificial definition of insolvency or bankruptcy. It should extend to all instances of "unpaid wages".

8. The administration of the fund ought to be carried out by the Ministry of Labour, through the Director of Employment Standards.

9. Where a Receiver and Trustee is appointed, the payments should be made through that medium and the

Ministry ought to establish a system for licencing Trustees, so that payments can be made directly without the need for prior verification of claims. In other words, a licenced Trustee ought to be able to call upon the Fund to underwrite an existing payroll.

10. Where no Trustee or Receiver has been appointed, claims should be directly administered by Employment Standards Branch personnel, which will require verification, and deduction of appropriate amounts for CPP, UIC, Income Tax, etc.

11. Where the Fund is required to extend payments, it should become subrogated to recover those amounts plus an amount to cover the expense of handling the claim.

Officers', Directors' and Employers' Liability

12. The Ministry ought to become subrogated for all monies paid plus 50%, against any employer, including trustees of trusts and directors and officers of corporate employers.

13. To facilitate recovery of unpaid wages, an employer's personal property (including realty), should become automatically impressed with a statutory trust upon judgment being filed in the Supreme Court of Ontario.

14. To prevent undue harm being caused to bona fide purchasers for value without notice, this trust shall be deemed to exist for a short period of time, say 90 days, within which period the Ministry would have to decide whether or not to seek recovery by realizing upon it.

15. To assist in this process, a summary procedure should be devised, permitting proof of such "unpaid wages" prima facie by simply filing an officer's report, and either utilizing the existing summary arbitration procedure provided by Section 45 of the Labour Relations Act for the hearing and decision, or by amending the existing provisions of the Employment Standards Act to achieve a similar result.

Industrial Standards Act

16. As a supplementary matter, the Industrial Standards Act should be amended to permit the establishment of an industry-wide vacation pay trust fund to be administered by the industry's Advisory Committee.

Payment of The Fund

17. The Fund ought to be funded either by the Consolidated Revenue Fund or by increasing registration fees on security registrations under the Personal Property Security Act, or a combination of both.

APPENDIX I

THE ABILITY OF THE PROVINCE TO PROTECT WAGES: THE CONSTITUTIONAL ISSUES

Simon C. Armstrong

THE ABILITY OF THE PROVINCE TO PROTECT WAGES: THE CONSTITUTIONAL ISSUES

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I. INTRODUCTION

The purpose of this appendix is to consider the constitutional capacity of the Legislature of Ontario to protect employees' wages in the event that their employer becomes insolvent or bankrupt. The ability of the province to protect wages by means of a statutory claim--that is, by means of a lien or trust--and through the establishment of a wage protection fund is examined.

After a general discussion of the constitutional framework in section II, and a review of the legislation in section III, section IV examines statutory claims. Since the effectiveness of such claims apparently depends on whether the claim is made by way of a lien or a trust, and whether it arises inside or outside of bankruptcy, a two-by-two categorization is employed. Thus, liens in non-bankruptcy and bankruptcy are discussed first, followed by trusts in non-bankruptcy and bankruptcy. The Supreme Court of Canada has specifically considered the position of liens in non-bankruptcy and bankruptcy, and the position of statutory trusts in receivership. As for statutory trusts in bankruptcy, there are two divergent lines of provincial court decisions, and these are considered in light of the 1983 decision of the Ontario Court of Appeal in Re Phoenix Paper Products Ltd.

The ability of the province to establish a wage protection fund is considered in section V. The conclusions that may be drawn from the discussion are contained in section VI.

II. THE CONSTITUTIONAL FRAMEWORK

1. Bankruptcy and Insolvency

The Constitution Act, 1867 is the source of authority to legislate concerning the protection of wages. Under section 91(21), the Parliament of Canada is granted express authority to make laws in relation to "bankruptcy and insolvency". Section 92(13) of the Act gives the province the authority to regulate "property and civil rights", including matters relating to employment and employees. To date, the federal government has only legislated in the area of bankruptcy by means of the Bankruptcy Act.[1] However, the provinces have exercised their power under section 92(13) and have legislated with respect to receiverships and less formal insolvencies.

In spite of the fact that legislation in the area of bankruptcy and insolvency is currently divided between the federal and provincial governments, the ability of the latter to protect wage earners is restricted by the "bankruptcy and insolvency" power because of certain doctrines of constitutional interpretation. Firstly, the "exclusiveness" doctrine, which the courts have derived from the opening words of sections 91 and 92 of the Constitution Act, 1867, holds that the list of subjects in each section is exclusive to Parliament or the provincial legislature to which it is assigned. Thus, a particular "matter" can come within the class of subjects in only one section, and even if Parliament or a legislature fails to legislate to the full limit of its power, the power of the other level of government is not thereby augmented.[2] Moreover, it should be noted that because Parliament does not give up legislative power simply by not exercising it to its full limit, it maintains the right to enact legislation to provide that in the event of insolvency or bankruptcy, creditors shall recover as specified in federal law, and in no other manner. In such legislation, Parliament would be fully entitled not to recognize provincially created trusts or security interests for insolvency purposes.[3]

On the other hand, the exclusiveness of the two lists does not mean that similar laws may not be enacted by both levels of government. Such laws may be enacted, not because the classes of subjects in section 91 and 92 overlap, but because they have a "double aspect", or "two matters". This "double aspect" doctrine acknowledges that some kind of laws have both a federal and provincial "matter", and are, therefore, capable of being validly enacted by both the federal and provincial governments.[4]

It should be noted that the doctrine of "federal paramountcy" constrains the ability of the provinces to protect wage earners. This doctrine holds that provincial laws which are valid under a provincial head of power--here, the "property and civil rights" power--are nonetheless inoperative and of no effect to the extent that they conflict with a valid federal law. However, this doctrine likely does not have such a broad application as it was traditionally thought to have because the Supreme Court of Canada has recently restricted the meaning of the term "conflict" to "actual conflict" in the sense that "compliance with one [statute] is defiance of the other". In Multiple Access v. McCutcheon, the Court held that "mere duplication without actual conflict or contradiction is not sufficient to invoke the doctrine of paramountcy and render otherwise valid provincial legislation inoperative."[5] Accordingly, it can be said that, in general, the Supreme Court would be very restrained in giving preclusive effect to section 91(21) should a provincial attempt to protect wage earners come before it. This is not to say that a province could expressly provide a scheme of priorities in bankruptcy different from those established by the Bankruptcy Act, or establish an alternative bankruptcy regime with more liberal provisions for wage earners.[6] However, as we shall see, provincial legislation directed at matters within provincial competence may be given effect, subject to the possibility of conflict with federal legislation, despite the intervention of bankruptcy.

2. The Federal Banking Power

Section 91(15) of the Constitution Act, 1867, which assigns legislative authority to Parliament in relation to "banking, incorporation of banks, and the issue of paper money", adds a further constitutional dimension to the question of the ability of a province to provide effective protection to wage earners. For present purposes, it is sufficient to note that although the assignment of legislative authority over "banking" to Parliament renders unconstitutional any provincial statute that can be characterized as in reality a law regulating banks, banks are not immune from generally applicable provincial legislation that does not conflict with federal law. Where there is conflict, however, the provincial law is rendered inoperative by virtue of the doctrine of federal paramountcy. In practice, it would seem unlikely that a provincial wage protection statute would be characterized by the courts as legislation in relation to "banking", so the fundamental issue here, as in the context of bankruptcy and insolvency, is whether a conflict can be said to exist.

III. LEGISLATION PROTECTING WAGE EARNERS IN ONTARIO

At the present time, there are certain statutes that attempt to protect the entitlements of Ontario employees in cases of business failure. In bankruptcies, section 107(1)(d) of the Bankruptcy Act alters what would otherwise be an equal distribution to unsecured creditors, and accords "wages ... for services rendered during three months next preceding the bankruptcy to the extent of five hundred dollars ..."[7] an unsecured but preferred status fourth in line behind the secured claims of creditors, such as banks. This provision has been held to apply only to unpaid wages, and not to severance or termination pay.[8]

In receiverships, section 14 of the Ontario Employment Standards Act[9] confers first preferred status to wages up to $2,000 per employee behind all secured creditors, but ahead of unsecured and general creditors:

> Notwithstanding the provisions of any other Act and except upon a distribution made by a trustee under the Bankruptcy Act (Canada), wages shall have priority to the claims or rights and be paid in priority to the claims or rights, including the claims or rights of the Crown, of all preferred, ordinary or general creditors of the employer to the extent of $2,000 for each employee.

"Wages" is defined in section 1(p) of the Act so as to include severance and termination pay. It should be noted that section 14 respects constitutional limitations, and that the priority does not purport to apply in cases of bankruptcy. It appears to be settled law that section 14 does not create a lien in favour of unpaid employees, and that a priority over all "preferred, ordinary or general creditors" does not afford them priority over secured creditors.[10]

In both bankruptcy and insolvency situations, vacation pay receives a different and superior protection than wages, termination or severance pay. Section 15 of the Employment Standards Act deems vacation pay that is owed to an employee to be held in trust:

> Every employer shall be deemed to hold vacation pay accruing due to an employee in trust for the employee whether or not the amount therefor has in fact been kept separate and apart by the employer and the vacation pay becomes a lien and charge upon the assets of the employer that in the ordinary course of business would be entered in books of account whether so entered or not.

This trust has been held to be valid by the High Court of Ontario in Re Diary Maid Chocolates Ltd. and Re Alduco Mechanical Contractors Ltd., and by the Ontario Court of Appeal in Re Phoenix Paper Products Ltd. on the ground that vacation pay was not part of the bankrupt employer's estate by virtue of section 47(a) of the Bankruptcy Act, and thus was not subject to the scheme of distribution prescribed in section 107(1). These cases are discussed in detail below.

Apart from the Employment Standards Act, there are other Ontario statutes of a more limited scope which protect wage earners in specific settings or occupations by creating a lien for unpaid wages. The most significant of these is the Mechanics' Lien Act,[11] which also uses the trust device. This trust was held to be constitutionally valid by the Supreme Court of Canada in John M.M. Troup Ltd. et al. v. Royal Bank of Canada.[12]

It should also be noted that in some bankruptcy and receivership situations, the federal Bank Act[13] comes into play. If a bank has extended a loan to a debtor company, as provided in sections 178 and 179 of the Act, wages earned in the three months preceding the business closure are accorded a secured status, along with the bank's own claim.

IV. STATUTORY CLAIMS TO PROTECT WAGE EARNERS

There have been various attempts by provincial legislatures to enact statutory claims to improve the position of wage earners vis-à-vis other creditors. The validity of such claims depends on whether the claim is being made by way of a lien or a trust, and whether the claim arises inside or outside of bankruptcy. For analytical purposes, it is, therefore, desirable to divide the topic into a two-by-two categorization: liens -- in non-bankruptcy and bankruptcy; and trusts -- in non-bankruptcy and bankruptcy.

It is natural to distinguish between liens and trusts because they are very different ways of creating a priority, and thus give rise to dissimilar issues and problems, as discussed below. The bankruptcy/non-bankruptcy distinction is important because the Supreme Court of Canada has indicated that it will treat at least some statutory liens differently depending on whether the claim arises inside or outside of bankruptcy. The distinction is founded upon section 107(1) of the Bankruptcy Act, which has been interpreted to reduce statutory liens to the status of preferred claims. The Supreme Court has not yet considered whether section 107(1) reduces statutory trusts to the same status, and there are conflicting decisions from the lower courts on this issue.

The two-by-two categorization will be employed to elucidate the approach that the courts have taken in each area. We will examine liens and trusts -- in non-bankruptcy and bankruptcy -- paying particular attention to the cases that have come before the Supreme Court of Canada to date.

1. Liens

(i) Non-Bankruptcy

At common law, a lien was the right that one person had to retain that which was in his or her possession but which belonged to another until the latter satisfied his or her obligations to the former.[14] The essence of a common law lien was possession. It typically arose in contractual situations, but could also arise in non-contractual ones. Legal title did not pass upon the lien coming into existence, and no power of sale accompanied it.

In addition, liens have been created by statute for various purposes.[15] A comparison of these statutes reveals that there is no uniformity in the statutory language creating these liens[16]; that they may or may not be assigned a priority position vis-à-vis the claims of other creditors[17]; and that they may apply to land, or to other assets, including chattel property.[18]

There is no doubt that as a matter of constitutional law, the provincial government can create liens by statute that will be effective in non-bankruptcy situations. However, the priority position of these liens vis-à-vis other creditors seems to be dependent on the language of the statute creating the lien. The Supreme Court of Canada considered a statutory lien for unpaid wages in the case of Board of Industrial Relations v. Avco Financial Services Realty Limited.[19] In this case, prior to any claim arising for wages, an employer and his wife granted two mortgages on their house. After default in payment, the house was sold pursuant to a judicial order. The Supreme Court was required to determine the respective priorities among claims to the proceeds of sale made by two mortgagees, and the Board of Industrial Relations on behalf of the unpaid employees. The Court held that the claims of the mortgagees had priority over the lien created by section 5A of the British Columbia Payment of Wages Act,[20] which was in the following terms:

> (1) Notwithstanding any other Act, the amount of wages set forth in a certificate issued under section 5 constitutes a lien and charge in favour of the Board payable in priority over any other claim or right, including those of the Crown in right of the Province, and without limiting the

> generality of the foregoing, such priority shall extend over every assignment, including an assignment of book debts, whether absolute or otherwise, every mortgage of real or personal property, and every debenture.
>
> (2) A certificate issued under section 5 shall constitute a lien and charge under subsection (1) from the date wages were earned, and shall extend to all moneys due from any source to the employer named in the certificate, including moneys due or accruing due from any contract, account receivable, and insurance claim.
>
> (3) Subsection (1) and (2) shall apply to every certification issued under section 5, whether issued before or after this section comes into force.

In response to the Board's submission that the lien created by section 5A applied to any property in which the employer had an interest, and that it prevailed over all rights in such property acquired by third parties at any time, Mr. Justice Martland held that the language of the section was not sufficiently specific to allow the statutory lien to have priority over rights in property, such as the two mortgages, that had been acquired prior to the time the lien came into existence:

> The property to which a section 5A lien attaches is not defined or identified. In the absence of a specific statutory provision to that effect, in my view it should not be construed in a manner which could deprive third parties of their pre-existing property rights.[21]

The Court distinguished a section 5A lien, which was not limited in its scope, from a lien, such as under the

British Columbia Workers' Compensation Act, that is statutorily confined to property used in, or in connection with, or produced by, the industry with respect to which the employer is assessed.[22]

(ii) Bankruptcy

The priority position of a statutory lien in the context of bankruptcy was considered by the Supreme Court of Canada in the case of Re Bourgault.[23] In this case, a motion was brought by a trustee in bankruptcy for the cancellation of a privilege registered against the bankrupt's estate by the Province of Quebec under section 30 of the Retail Sales Tax Act.[24] This section provides:

> 30. Every sum due to the Crown [in right of Quebec] under this Act shall constitute a privileged debt ranking immediately after law costs.

The trustee claimed that the debt to the province for sales tax was merely a preferred debt under section 107(1)(j) of the Bankruptcy Act, which states:

> 107(1) Subject to the rights of secured creditors, the proceeds realized from the property of a bankrupt shall be applied in a priority of payment as follows:
>
> . . . . .
>
> (j) claims of the Crown not previously mentioned in this section, in right of Canada or of any province, pari passu notwithstanding any statutory preference to the contrary.

The Deputy Minister of Revenue took the position that the Crown was a secured creditor, and that, therefore, the claim fell within the opening words of section 107(1). A "secured creditor" is defined in section 2 of the Bankruptcy Act as:

> ... a person holding a mortgage, hypothec, pledge, charge, lien or privilege on or against the property of the debtor or any part thereof as security for a debt due or accruing due to him from the debtor ...

The majority of the Supreme Court accepted the argument of the trustee, and held that the province was not to be treated as a secured creditor, but as a preferred creditor, under section 107(1)(j) of the Bankruptcy Act, even though, by reason of the privilege, the province might fall within the meaning of "secured creditor" in section 2 of the Act. The Court concluded that in enacting the scheme of distribution contained in section 107, Parliament intended that claims of either the federal or the provincial governments were to be treated as preferred claims except in cases where section 107 provided otherwise. The Court held that the phrase "notwithstanding any statutory preference to the contrary" at the end of section 107(1)(j) reinforced the conclusion that government liens ordinarily should be reduced to the status of preferred claims in bankruptcy. Mr. Justice Pigeon stated:

> It is abundantly clear that this [section 107] was intended to put on an equal footing all claims by Her Majesty in right of Canada or of a Province except in cases where it was provided otherwise, namely, para. (c), the levy, and para. (h), workmen's compensation or unemployment insurance assessments and withholdings for income tax. Paragraph (j) ends with the following words: "notwithstanding any statutory preference to the contrary". The purpose of this part of the provision is obvious. Parliament intended to put all debts to a government on an equal footing; it therefore cannot have intended to allow provincial statutes to confer any higher priority. In my opinion, this is precisely what is being contended for when it is argued that, because the Quebec statute creates a privilege on immovable property effective from the date of registration, the Crown thereby becomes a "secured creditor" and thus escapes the effect of the provision which gives it only a lower priority.

In his dissenting opinion, Mr. Justice Estey focussed on the definition of "secured creditor" in section 2. He accepted the Deputy Minister's submission that this definition included statutory liens, and that the opening words of section 107(1) governed. In his view, clause (j) was inapplicable despite the presence of the phrase "notwithstanding any statutory preference to the contrary".

Re Bourgault was applied by the Supreme Court of Canada in the recent case of Deloitte, Haskins and Sells Limited v. Workers' Compensation Board et al.[25] In this case, the Supreme Court was required to rule on the interaction of section 78(4) of the Alberta Workers'

Compensation Act[26] and section 107 (1)(h) of the Bankruptcy Act. The particular issue involved was whether section 78(4) of the Alberta statute made the Board a secured creditor of the bankrupt employer for the purposes of the opening words of section 107(1) of the Bankruptcy Act, or whether the Board's claim fell under paragraph (h) of the subsection, and was postponed to the claims listed in paragraphs (a) to (g). The opening phrase of section 107(1) provides that the scheme of distribution set out therein is "subject to the rights of secured creditors", and section 2 of the Act contains a definition of "secured creditor", as indicated above. In a six-to-one decision, the Supreme Court reaffirmed that the scheme of distribution established in the Bankruptcy Act has priority over provincial legislation. In non-bankruptcy situations, such legislation is constitutionally valid and effective, whereas in a bankruptcy, provincial legislation must yield to the priorities of the Bankruptcy Act.

Madam Justice Wilson, with whom Mr. Justice McIntyre and Mr. Justice Lamer concurred, cited Royal Bank v. Larue,[27] Re Gingras Automobile[28] and Re Bourgault as authority for the proposition that the bankruptcy and insolvency power of the federal government enables Parliament to change priorities conferred by provincial legislation, and that section 107(1) has, in fact, changed such priorities in a bankruptcy situation. In her view, no valid distinction could be drawn between Re Bourgault and Deloitte:

> Counsel for the appellant submits that Bourgault is a judgment of this court directly in its favour. Counsel for the board distinguishes Bourgault on the basis it was dealing with a claim under para. (j) of s.107(1) as opposed to para.(h) and para.(j) ends with the phrase "notwithstanding any statutory preference to the contrary". This, he submits, makes it clear that the provincial legislation yields to the scheme of distribution under s.107(1) as far as claims under para.(j) are concerned. No such overriding language appears in para.(h).
>
> With respect, it seems to me that the "notwithstanding" language in para.(j) was a second string to the court's bow in Bourgault...
>
> The "notwithstanding" language reinforced the principle in Larue and Gingras...that provincial legislation yields to federal in the event of bankruptcy. I do not think the majority reasons in Bourgault can be divorced from the wider principle and made to rest solely on the "notwithstanding" provision.[29]

Madam Justice Wilson concluded by stating that she did not believe that section 107(1)(h) of the Bankruptcy Act conflicted with the Alberta legislation in question so as to render the latter inoperable. Referring to Multiple Access Ltd. v. McCutcheon and Quebec North Shore Paper Company v. C.P. Limited[30], she stated that these authorities favour a restrictive approach to the concept of "conflict", and a construction of impugned provincial legislation, where it is possible, so as to avoid operational conflict with valid federal legislation. Accordingly, she held that both the Bankruptcy Act and the Alberta legislation could stand, and have their own legitimate spheres of operation: the latter applies only in non-bankruptcy situations; the former applies to determine priorities in a bankruptcy. Therefore, in her view, it was not necessary to apply the doctrine of paramountcy of federal legislation.

On this last point, Mr. Justice Chouinard disagreed. In his view, the Alberta statute conflicts with the Bankruptcy Act, and thus the federal legislation must prevail. Mr. Justice Dickson, as he then was, and Mr. Justice Beetz concurred in this view.

In his dissenting opinion, Mr. Justice Estey took a very different approach to the interaction between provincial legislation and the scheme of priorities contained in the federal legislation. In his view, it must first be determined whether the provincial legislation has the effect of creating a secured claim, and then whether the secured status is removed by the Bankruptcy Act. He held that section 78(4) of the Alberta statute had created a secured claim. He then went on to note that the definition of "secured creditor" in section 2 of the Bankruptcy Act does not exclude secured claims created by provincial legislation, and that the opening words of section 107(1) of the Act, together with section 50(6), demonstrate that it was the general intention of Parliament not to interfere with provincial priorities. It is only where there is an explicit directive, such as the one contained in the "notwithstanding" clause of section 107(1)(j) that provincial priorities are upset, and secured creditors relegated to a lesser status. Since such a directive is not contained in section 107(1)(h) of the Bankruptcy Act, Mr. Justice Estey held that the Alberta Board was entitled to rank as a secured creditor.

2. Trusts

(1) Non-Bankruptcy

Underhill's classic definition of a trust is as follows:

> A trust is an equitable obligation imposing upon a person (who is called the trustee) the duty of dealing with property over which he has control (which is called the trust property) for the benefit of persons (who are called the beneficiaries or cestuis que trust), of whom he may himself be one, and any one of whom may enforce the obligation.[31]

For a non-statutory trust to be valid, the general rule is that three certainties must co-exist: firstly, certainty of intention to create a trust; secondly, certainty of subject matter; and thirdly, certainty of objects, that is, the beneficiaries and what interest they are to take. However, despite the co-existence of these three certainties, trusts have been defeated because the courts have been unable to find an identifiable trust res. Thus, it can be said that a trust is effective only so long as a trust res can be identified or traced.[32]

By contrast, a trust created by statute is an artificial trust, and bears little resemblance to the ordinary trust. In most cases, the three certainties do not co-exist at the time the trust is thought to be operative, and it is unlikely that there will be an identifiable trust res. Accordingly, a statutory trust should be thought of as a "deemed" trust rather than a "real" trust.

Statutory trusts must be contrasted with the statutory liens discussed above. A statutory lien implies the existence of a debtor-creditor relationship, whether the claim be secured or not, and the enforcement of the lien results in a distribution of the debtor's assets to that creditor. In the case of a statutory trust, however, there is no debt, but rather a proprietary right in the amount notionally or actually set aside under the trust. In enforcing the trust, the beneficiary is merely seeking to recover his or her own property as cestui que trust from the trustee. The matter was put this way by McNair, C.J.N.B. in Moore v. The Queen where the Crown was claiming that it was a secured creditor within the meaning of section 2 of the Bankruptcy Act:

> To bring a claimant within the scope of that definition so as to entitle him to rank as a secured creditor in the distribution of the assets of a bankrupt the relationship of creditor and debtor must exist. The words used to define a secured creditor are "a person holding a mortgage ... lien or privilege on or against the property of the debtor or any part thereof as security for *a debt due or accruing due* to him from the debtor".
>
> Such was not the position of the parties in the case at bar. Theirs was a fiduciary relationship under which as *cestui que trust* Her Majesty in the right of the Province was entitled as beneficial owner to tax monies in the hands of the debtor with a right to an accounting for same and, on his bankruptcy, to follow the funds in the hands of the Trustee in Bankruptcy so far as they could be traced. There was at the date of the bankruptcy no debt due to or accruing due from the debtor to Her Majesty who in consequence cannot be considered a secured creditor within the meaning of the term as used in the Act.[33]

As noted above, the ability of the provinces to create valid statutory trusts was confirmed in the case of *John M.M. Troup* in 1962. More recently, the Supreme Court of Canada decided the case of *Dauphin Plains Credit Union Ltd.* v. *Xyloid Industries Ltd. et al.*,[34] which dealt with statutory trusts created by three federal statutes, and the rights of a secured creditor who had appointed a receiver, as it was entitled to do, under a debenture. Also at issue was the relationship between the three federal statutes and the *Manitoba Payment of Wages Act*. Issues arising from three situations were considered by the Court. Firstly, before the appointment of the receiver, deductions had been made from the wages of the employees, as required by the Income Tax Act, the Canada Pension Plan Act, and the Unemployment Insurance Act, 1971, but the employer-debtor had insufficient funds to set aside the deductions in trust for the Minister of National Revenue, as required by the Acts. Secondly, after his appointment, the receiver paid wages to the employees that had been earned prior to the receivership, and the required deductions were made by the receiver. Thirdly, employees worked for the receiver after his appointment and deductions were made from these wages. It was admitted by the Minister that deductions on wages earned in the service of the receiver (the third situation) had been duly remitted. However, it was a matter of contention whether the Minister was entitled to the deductions that had been made with regard to the other two situations: firstly, deductions that had been made before the receiver's appointment but that the employer-debtor had failed to hold in trust as required by the various Acts; and secondly, deductions made by the receiver in respect of wages accruing to the employer-debtor's employees prior to the receiver's appointment but not yet paid over by the receiver.

The Supreme Court indicated that the claim for the deductions could not affect the fixed charge which had been granted before the claim for the deductions had arisen. The contest was between the floating charge granted prior to the time the claim for the deductions had arisen, but which had not crystallized when the claim for the deductions arose, and the claim for the deductions under the three federal Acts.

The majority of the Supreme Court held that the Minister was entitled to the deductions from the wages paid by the receiver which had been earned by the employees before the receivership because the deductions were made pursuant to the requirements of the federal statutes.

With respect to the first situation described above, the Court held that the Minister was entitled to the deductions made by the employer-debtor prior to the receivership under the Canada Pension Plan Act and the Unemployment Insurance Act but not under the Income Tax Act. The Court concluded that there was deemed to be a trust in favour of the Crown, and that the deductions were deemed to be kept separate and apart pursuant to section 24(4) of the Canada Pension Plan Act and section 71(3) of the Unemployment Insurance Act, notwithstanding that the employer-debtor in fact did not keep the deductions separate. However, the Court held that the Minister was not entitled to the deductions for income tax deductions made by the employer-debtor prior to the receivership. This was because the deductions were not set aside and could not be traced, and because section 227(5) of the Income Tax Act, unlike the Canada Pension Plan Act and the Unemployment Insurance Act, contained no provision deeming the deductions to be kept separate and apart.[35]

In making the distinctions between deductions under the Canada Pension Plan Act and the Unemployment Insurance Act, and the deductions under the Income Tax Act, the majority of the Supreme Court relied heavily on the decision of the Ontario Court of Appeal in Re Deslauriers Construction Products Ltd.[36] Mr. Justice Pigeon stated:

> It will be noted that after providing in s-s.24(3) as in s-s.227(4) of the Income Tax Act, that the employer who has deducted an amount "shall be deemed to hold the amount so deducted in trust for Her Majesty", s-s.24(4) goes on to provide that "In the event of any liquidation" an equal amount "shall be deemed to be separate from ... the estate in liquidation ... whether or not that amount has in fact been kept separate". It is clear from the following passage of the judgment delivered by Gale, C.J.O. (at pp. 553-4 D.L.R.) that the claim for the Canada Pension Plan deductions was upheld in Deslauriers by reason only of those words which are not in the Income Tax Act ...

At pages 553-4 D.L.R., Gale C.J.O. had said:

> ... it seems to us that subsection (4) and particularly the concluding six words thereof, were inserted in the Act specifically for the purpose of taking the

> moneys equivalent to the deductions out of the estate of the bankrupt by the creation of a trust and making those moneys the property of the Minister ...
>
> We agree ... that the word "deemed" in the fourth line of subsection (4) must be used in the sense of a conclusive rather than a rebuttable presumption ...

Mr. Justice Pigeon then said that "[he found] the reasoning in Deslauriers wholly persuasive ..." This statement is a clear indication that the decision in Deslauriers constitutes good law. It is to be noted that Deslauriers was a bankruptcy case.

As for the second situation, wages earned before receivership but paid by the receiver pursuant to the Payment of Wages Act of Manitoba where the receiver had withheld the amounts claimed as income tax deductions, Canada Pension Plan (employee portion) and unemployment insurance (employee portion) deductions, but paid to the employees only the amount of wages due net of those deductions, it was held that the deductions for income tax were not a deduction for the benefit of the employee because they were to be remitted to the Receiver General of Canada on account of the employee's tax liability. The amount withheld remained a part of the wages. Since the deductions were duly made and entered in the books and the receiver had ample funds for paying the full amount of wages due, the deductions were true deductions, not mere bookkeeping entries. Accordingly, the money withheld became held in trust in favour of the tax collector, who was, therefore, entitled to claim it from the receiver. The Crown was also entitled to priority with respect to employee deductions relating to Canada Pension Plan contributions and unemployment insurance premiums, but not as deductions for the employer portion.

Mr. Justice Estey dissented. With respect to the wages paid by the employer-debtor before the appointment of the receiver where deductions had been made but not put aside, he held that a receivership was not a "liquidation", "assignment", or "bankruptcy", as required by the legislation, and that the provisions concerning deemed trusts relating to the deductions thus were not applicable. Accordingly, the Minister failed to rank ahead of the secured creditor.

As for the receiver's payments of wages earned prior to the receivership, Mr. Justice Estey was of the view that these payments amounted to a discharge of a statutory lien based on section 7(1) of the Manitoba Payment of Wages Act, rather than the simple payment of wages. He thus concluded that the receiver was not obliged to make the deductions since such deductions were only to be made from wages.

For present purposes, the primary significance of the Dauphin Plains case is that it confirms that a statutory trust may be effective in a non-bankruptcy context depending on the statutory language used to create the trust. In this connection, it is important to bear in mind the distinction the Court drew between "ordinary" trusts created by statute and "deemed" statutory trusts. This distinction is important because the Court held that where the money had been deducted and held separate and apart, or could be traced, the Minister would recover. However, where the money had not been held separate and apart or could not be traced, then only in the case of "deemed" trusts would the Minister recover.

The Court indicated that claimants which were to be the beneficiaries of the trusts could not affect fixed charges granted before the claims for the deductions had come into existence. The contest could only be between the floating charge granted prior to the time the claim for the deductions had arisen, but which had not crystallized when the claims for the deductions arose, and the claim for the deductions under the various statutes. The Court then went on to discuss the difference between "ordinary" and "deemed" statutory trusts. In the case of the "ordinary" trusts, the Court held that unless the funds which were to form the subject matter of the trust had been held separate and apart, or could be traced, the trust would be held invalid. On the other hand, in the case of "deemed" trusts, the Court held that the trusts would be held to exist and be payable to the beneficiaries regardless of whether the money was held separate and apart.

(ii) Bankruptcy

As noted above, the Supreme Court of Canada held in the John M.M. Troup case that the trust provisions of the Mechanics' Lien Act were competent provincial legislation authorized by the "property and civil rights" power allocated to the provinces under section 92(13) of the Constitution Act, 1867, and were not in conflict with federal banking or bankruptcy legislation as such. The main issue in the case related to banking legislation, yet Mr. Justice Judson, who gave the principal majority judgment, asserted:

> As to bankruptcy, the creation of the trust by section 3(1) [of the Mechanics' Lien Act] does affect the amount of property divisible among the creditors but so does any other trust validly created.[37]

The issue to be considered at this point is whether the general proposition advanced in the Troup case that statutory trusts are valid provincial legislation and are effective in bankruptcy is still good law. The Supreme Court of Canada has not yet considered whether section 107 of the Bankruptcy Act prevails over statutory trusts, as well as statutory liens, and there are conflicting provincial court decisions on this matter.

The decision of the Ontario Court of Appeal in Re Phoenix Paper Products Limited[38] examined the divergent lines of cases on this issue. The first line of cases, which adopts the view that Re Bourgault determines the matter, and that statutory trusts created by the provinces must yield to the Bankruptcy Act, consists of: Re Black Forest Restaurant Ltd.[39]; Workers' Compensation Board v. Kinross Mortgage Corporation et al.[40]; Coopers and Lybrand v. R. in Right of Canada et al.[41]; and Re Racknagel.[42] The conflicting line of cases is made up of: Re Dairy Maid Chocolates Ltd.[43]; Re KRA Restaurants Ltd.[44]; the Deslauriers and Dauphin Plains cases; Re Reimer[45]; and Re Kraemer.[46]

It is convenient to begin a consideration of these two lines of cases with the oldest case, Re Dairy Maid Chocolates, which is in the second list. This case, which was decided before Re Bourgault, dealt with a claim for vacation pay owing to employees of the debtor company filed pursuant to section 47(a) of the Bankruptcy Act as a trust claim based on section 8(2) of the Ontario Employment Standards Act[47], the predecessor to the present section 15. Mr. Justice Houlden rejected the argument that the statutory trust for vacation pay was invalid because the province was attempting to create a different scheme of distribution than that provided by the Bankruptcy Act. He stated:

> The creation of the trust is in no way related to bankruptcy. By s. 30 of the Employment Standards Act, the charge became effective not on bankruptcy, but on termination of employment for any cause or by operation of law. Bankruptcy would come within the words "by operation of law".

He went on to conclude:

> The provincial Legislature has the right to create a valid trust, and in my opinion, it has done so in s. 8(2) of the Employment Standards Act. By s. 47(a) of the Bankruptcy Act, such trust property does not form part of the property of the bankrupt. The claim is, therefore, a valid charge on the property of the debtor in the hands of the trustee.
>
> The present case is unlike Re Deslauriers Construction Products Ltd., [1970] 3 O.R. 599, 13 D.L.R. (3d) 551, 14 C.B.R. (N.S.) 197, in that the trust is enforceable only in respect of assets of the employer that were in existence at the date of the termination of the employment. It does not purport to create a charge on assets of the bankrupt estate. It is also different from Moore v. The Queen (1957), 15 D.L.R. (2d) 681, 37 C.B.R. 112, 42 M.P.R. 86, in that the charge is created on the assets of the employer in the hands of the employer not on property in the hands of the trustee. The property which passes to the trustee in bankruptcy or the trustee under the proposal is subject to the charge by the trust when the trustee receives it.[48]

The facts in the Nova Scotia case of Re Black Forest Restaurant Ltd. were similar to those in Dairy Maid Chocolates, but the court reached the opposite conclusion. The trial judge was concerned with claims for wages and vacation pay of former employees of the bankrupt, and with claims of the Workers' Compensation

Board for assessments made against the employer both before and after bankruptcy. The Board claimed as a "secured creditor" under a statutory lien provided for by section 125 of the Workers' Compensation Act,[49] which provided a "first lien" subject to some stated exceptions for the amount of assessment under the Act. The Director of Labour Standards claimed the wages and vacation pay under section 34 of the Labour Standards Code,[50] which deemed vacation pay to be a mortgage on the assets of the employer.

The trial judge did not consider section 47(a) of the Bankruptcy Act, nor did he discuss any differences between the statutory lien under the Workers' Compensation Act and the statutory trust under the Labour Standards Code. Instead, he quoted from the majority judgment in Re Bourgault, referred to two decisions[51] in which Re Bourgault was applied, and concluded:

> The result, in my opinion, is that, so long as there is no bankruptcy, full effect must be given to statutory provisions such as those contained in the Labour Standards Code of this province and in the Workers' Compensation Act of this province, which create liens and charges on property ranking ahead of pre-existing interests such as those created by mortgages or assignments of book debts, affecting the property said to be subject to the statutory liens and charges. However, when bankruptcy occurs, the provisions of s. 107 of the Bankruptcy Act take effect and the scheme of distribution of the property of the bankrupt coming into the hands of the trustee must be followed. The statutory liens and charges,

> to the extent to which they are affected by the provisions of s. 107, cease to be of any force and effect. The rights of secured creditors, whose security arises apart from such statutes, are preserved and may be enforced against the property charged by way of security. The creditors for whose benefit the statutory liens and charges were created are no longer entitled to enforce those statutory liens and charges, except to the extent permitted by s. 107, and their claims are dealt with in the priority set out in s. 107.[52]

The Nova Scotia Court of Appeal dismissed an appeal of this decision on the basis that the Bourgault case was correctly applied, and was "definitive in disposing of the issues raised on this appeal."[53]

In the Kinross Mortgage case, the British Columbia Court of Appeal quoted extensively from and applied both the Black Forest Restaurant and the Bourgault cases to hold that the statutory lien created under the Workers' Compensation Act[54] by which the Workers' Compensation Board claimed as a "secured creditor", was overriden by section 107(1) of the Bankruptcy Act, and was thus of no effect upon a bankruptcy.

The Coopers and Lybrand case goes even further, and holds that "deemed" trusts, even those enacted by Parliament, cannot prevail in bankruptcy. In this case, the British Columbia Supreme Court considered claims under the "deemed" trust provisions of the Canada Pension Plan Act, the Unemployment Insurance Act and the British

Columbia Social Services Tax Act.[55] Mr. Justice Taylor distinguished the trusts created by the federal statutes from the one created by the provincial statute as follows:

> The two federal statutes invoked seem to me to create only "artificial" trusts in cases where no funds have in fact been set aside. In the case of the provincial statute, however, there is in every instance the possibility of a "real" trust, capable of standing on its own feet without the necessity of any statutory fiction-writing to that effect.
>
> The obligation to keep funds separate - something common to the federal statutes - has been held in some cases to be evidence of an intention to create a trust. But such an obligation cannot in itself establish a trust relationship in law where no funds ever in fact exist to which trust obligations can attach. Nor can absence in the provincial statute of an obligation to keep funds separate show that funds received under that statute on behalf of the Crown could not, in law of equity, be received in trust.[56]

He went on to hold that, although the Bourgault decision meant that the lien imposed by the Social Service Tax Act could not prevail in a bankruptcy, the funds in fact received by the bankrupt under the Act were received by it in trust on behalf of the Crown. Therefore, the declaration of a trust in the statute was a fair characterization of the relationship between the bankrupt and the Crown which did not offend the Bourgault rule. On the other hand, he held that the deemed trusts created under the federal statutes were "artificial" because no money had in fact been set aside, and that, as such, they were to be overriden by the Bankruptcy Act, as interpreted in Bourgault. As well, he noted that "artificial trusts" created by provincial statutes had been held to be ineffective in bankruptcy as a result of that decision.

The views of the Court on the issue of statutory trusts may be summarized as follows:

> (1) In a bankruptcy, section 107(1) of the Bankruptcy Act prevails over deemed trust obligations in other statutes that purport to give Crown claims a higher priority than they are assigned under section 107(1);
>
> (2) All deemed trusts, whether federal or provincial, are to be ignored in the distribution of assets upon bankruptcy, except those federal trusts that came into existence after, and contain explicit reference to section 107;
>
> (3) On the other hand, where a trust is created by provincial or federal statute that could also arise under the ordinary rules of law or equity, (and, in particular can be traced) section 107 will not defeat the trust;
>
> (4) If the property cannot be traced, effect will not be given to the trust, and the position is as in (1) and (2) above.

It is to be noted that Mr. Justice Taylor said that the Dauphin Plains case was not binding upon him because it dealt with a contractual receivership rather than a bankruptcy. On this basis, he disagreed with the earlier case of Re Reimer, in which Hardinge L.J.S.C. had held that the same trust provision of the British Columbia

Social Service Tax Act was effective in bankruptcy in light of Dauphin Plains.[57]

In Re Kraemer, the Supreme Court of Ontario explicitly rejected Mr. Justice Taylor's view that Re Bourgault eliminated deemed trusts in bankruptcy as being impossible to reconcile with the decision of the Ontario Court of Appeal in Deslauriers, which was approved without reservation by the majority of the Supreme Court of Canada in Dauphin Plains.

In the later case of Re Phoenix Paper Products Limited, Mr. Justice Tarnopolsky stated that it was impossible to view Mr. Justice Taylor's dismissal of the deemed trusts under the federal legislation as other than a contradiction of the Dauphin Plains case. He referred to the majority judgment where Mr. Justice Pigeon said:

> It seems to me that it would not make sense to hold that, because the assets of a company were realized by a receiver appointed at the request of a creditor rather than by a liquidator or a trustee in bankruptcy appointed by a court, the claim for wages should fail. It appears to me that there is no reason not to give the word "liquidation" its wide meaning in usual language.[58]

He noted that Mr. Justice Pigeon had gone on to equate "liquidation" with "bankruptcy", and had concluded:

> In my opinion the majority in the Court of Appeal of Manitoba properly held that the amount deducted by the employer from employees' wages for Pension Plan and unemployment insurance contributions was to

> be deemed to have been held in trust for Her Majesty at the date of the receiving order and consequently was to be deemed to have been realized by the receiver out of the assets subject to the floating charge.[59]

Accordingly, the Ontario Court of Appeal approved the following summation, by Hardinge L.J.S.C. in Re Reimer, of the effect of the decisions in Bourgault and Dauphin Plains:

> Shortly after deciding the Rainville [Re Bourgault] case, the Supreme Court of Canada held in Dauphin Plains Credit Union v. Xyloid Indust. Ltd. that where the provisions of a statute create a trust in respect of funds in the hands of a person who later becomes bankrupt, and when the statute creating the trust provides that such funds are "deemed" to be kept separate and apart from the assets of the collector, the Crown in favour of whom the trust is created is entitled, on bankruptcy, to receive them even when the collector has not in fact kept the deductions separate. On the [Dauphin Plains] case, Mr. Justice Pigeon, in giving the reasons of the majority of the court, said ... "From the moment such change was created, the assets subject thereto, were no longer the property of the debtor except subject to that change."[60]

The issue in the Phoenix Paper Products case was whether section 15 of the Employment Standards Act, which deems vacation pay to be held in trust for the employee, is effective in bankruptcy. The Ontario Court of Appeal considered the two lines of cases discussed above, and concluded:

> (1) The provincial legislatures can create valid trusts by legislation: the Troup case.

(2) A "deemed" trust created by legislation has been held to be enforceable in bankruptcy: the Dauphin Plains case.

(3) Section 15 of the Employment Standards Act creates a valid "deemed" trust.

(4) By s. 47(a)[61] of the Bankruptcy Act, property held in trust does not form part of the property of the bankrupt.

(5) Therefore, Houlden J. in the Dairy Maid Chocolates case, Steele J. in Re Alduco, and Gray J. in this case were correct in concluding that s.15 of the Employment Standards Act creates a valid "deemed" trust claim within the meaning of s. 47(a) of the Bankruptcy Act and, as such, does not form part of the "property of a bankrupt divisible among his creditors".[62]

V. THE WAGE PROTECTION FUND

The establishment of a wage insurance fund is a third method of protecting employees from wage loss occurring as a result of the bankruptcy or insolvency of their employer. There appear to be no serious constitutional objections to either a provincial legislature or Parliament enacting such a scheme.

Though the validity of a provincial wage protection fund does not appear to have been judicially considered, it seems unlikely that any constitutional challenge would succeed. Provincial authority over all aspects of employment is indisputable, except in the limited number of undertakings, such as banking, shipping and interprovincial transportation and communications, that are within federal legislative competence. A provincial legislature is therefore generally free to establish a fund to protect employees against wage loss.

It may be argued that certain provisions of such a wage insurance fund may be open to constitutional question because the fund would compensate employees in cases where the employer goes into bankruptcy. However, it is doubtful that such provisions would be characterized, for constitutional purposes, as relating to bankruptcy, and therefore beyond the power of the province to enact: there is no attempt to disrupt priorities in bankruptcy, but only to protect employees against its consequences.

The scope for federal action outside the context of formal bankruptcy is not entirely certain. However, it can generally be said that the scope of the federal power over bankruptcy and insolvency under section 91(21) of the Constitution Act, 1867 is broad, and that all insolvencies could be brought within the ambit of federal law, if Parliament chose to do so. In all probability, valid federal legislation could be enacted to require the prior payment of wages in any insolvency, even one not otherwise administered under federal law, or to establish a wage insurance scheme to operate in similar circumstances.

In the absence of specific details of any federal scheme of wage protection, its impact on provincial legislation directed at the same purpose cannot be assessed with any degree of assurance. However, it should be noted that the general position on conflict between federal and provincial legislation would apply (that is, for federal legislation to prevail over provincial legislation, there must be "actual conflict or contradiction": see the discussion of Multiple Access v. McCutcheon in section II 1. above), and that if the federal law expressly indicated that it was to be the sole determinant of employees' protection in bankruptcy and insolvency, a provincial law would be rendered inoperative.

VI. CONCLUSIONS

The following conclusions may be drawn from the above discussion:

1. Under section 91(21) of the Constitution Act, 1867, the Parliament of Canada is empowered to legislate in relation to "bankruptcy and insolvency". Although Parliament has only legislated in relation to bankruptcy to date, it is free to occupy the field of insolvency as well, and to ignore provincially created trusts or liens.

2. Outside bankruptcy, the provinces may legislate to protect wages by means of a lien, the priority accorded to such liens being determined by the statutory language creating them. In bankruptcy, such liens are overriden by the Bankruptcy Act: Re Bourgault; Deloitte, Haskins and Sells.

3. In non-bankruptcy, the provinces may enact effective legislation to protect wages by means of a trust. However, there is divergence in the reported cases as to the position of statutory trusts in bankruptcy:

    (a) There is authority for the proposition that section 107(1) prevails over both statutory liens and trusts: the Black Forest Restaurant and Coopers and Lybrand cases.

    (b) Although it is *obiter*, there is authority in the Coopers and Lybrand case suggesting that if the trust *res* created by the statutory trust is traceable, then it is effective notwithstanding section 107(1) of the Bankruptcy Act.

    (c) There is authority for the proposition that notwithstanding section 107, the statutory trust is valid and effective provided that the statutory language is appropriate, and the trust *res* is identifiable or traceable: Dauphin Plains.

    (d) There is authority to the effect that the statutory trust is valid and effective, and that section 107(1) does not apply to the Crown's claim based on such a trust: Dauphin Plains.

4. The position of the Ontario courts with respect to statutory trusts is represented by Re Dairy Maid Chocolates, Re Alduco, Re Kraemer, and Re Phoenix Paper Products based largely on Dauphin Plains. In other words, the Ontario courts have held that statutory trusts are constitutionally valid and enforceable, and, by virtue of section 47 of the Bankruptcy Act, do not form part of the property of the bankrupt, and therefore section 107 of the Act does not apply.

5. There does not seem to be any obvious constitutional objection to the establishment of a federal or provincial wage insurance fund to compensate employees for wage loss due to the bankruptcy or insolvency of their employer.

NOTES

1. R.S.C. 1970, c. B-3.

2. Thus, in Union Colliery Company of British Columbia v. Bryden (1899), A.C. 580, 588 the Privy Council held that the fact that Parliament had not legislated to the full limit of its powers under the "naturalization and aliens" head of power under section 91(25) of the British North America Act, 1867 (now the Constitution Act, 1867) did not have the effect of transferring to the Legislature of British Columbia the power to enact legislation prohibiting "Chinamen" from being employed in underground mines.

3. In Attorney-General of Quebec v. Larue, [1928] 1 D.L.R. 945, the Privy Council stated:

   > The exclusive authority...given to the Dominion Parliament to deal with all matters arising within the domain of bankruptcy and insolvency enables that Parliament to determine by legislation the relative priorities under a bankruptcy [regardless of the creditors' position under provincial law].

4. See Hodge v. The Queen (1883), 9 App. Cas. 117, 130 where the Privy Council stated that "subjects which in one aspect and for one purpose fall within section 92 [of the B.N.A. Act] may in another aspect and for another purpose fall within section 91".

5. Multiple Access v. McCutcheon (1983), 138 D.L.R. 1 at 23-24.

6. Cases such as Reference re Validity of the Orderly Payment of Debts Act, 1959 (Alta.) c.61 (1960), 23 D.L.R. (2d) 449 (S.C.C.) constitute conclusive authority against these propositions.

7. Section 107(1) of the Bankruptcy Act is in the following terms:

107.(1) Subject to the rights of secured creditors, the proceeds realized from the property of a bankrupt shall be applied in priority of payment as follows:

(a) in the case of a deceased bankrupt, the reasonable funeral and testamentary expenses incurred by the legal personal representative of the deceased bankrupt;

(b) the costs of administration, in the following order,

(i) the expenses and fees of the trustee;
(ii) legal costs;

(c) the levy payable under section 118;

(d) wages, salaries, commissions or compensation of any clerk, servant, travelling salesman, labourer or workman for services rendered during three months next preceding the bankruptcy to the extent of five hundred dollars in each case; together with in the case of a travelling salesman, disbursements properly incurred by him in and about the bankrupt's business, to the extent of an additional three hundred dollars in each case, during the same period; and for the purposes of this paragraph commissions payable when goods are shipped, delivered or paid for, if shipped, delivered or paid for within the three-month period, shall be deemed to have been earned therein;

(e) municipal taxes assessed or levied against the bankrupt within two years next preceding his bankruptcy and that do not constitute the real property of the bankrupt, but not exceeding the value of the interest of the bankrupt in the property in respect of which the taxes were imposed as declared by the trustee;

(f) the landlord for arrears of rent for a period of three months next preceding the bankruptcy and accelerated rent for a period not exceeding three months following the bankruptcy if entitled thereto under the lease, but the total amount so payable shall not exceed the realization from the property on the premises under lease, and any payment made on account of accelerated rent shall be credited against the amount payable by the trustee for occupation rent;

(g) the fees and costs referred to in subsection 50(2) but only to the extent of the realization from the property exigible thereunder;

(h) all indebtedness of the bankrupt under any Workmen's Compensation Act, under any Unemployment Insurance Act, under any provision of the Income Tax Act or the Income War Tax Act creating an obligation to pay to Her Majesty amounts that have been deducted or withheld, pari passu;

(i) claims resulting from injuries to employees of the bankrupt to which the provisions of any Workmen's Compensation Act do not apply, but only to the extent of moneys received from persons or companies guaranteeing the bankrupt against damages resulting from such injuries;

(j) claims of the Crown not previously mentioned in this section, in right of Canada or of any province, pari passu notwithstanding any statutory preference to the contrary.

(2) Subject to the retention of such sums as may be necessary for the costs of administration or otherwise, payment in accordance with subsection (1) shall be made as soon as funds are available for the purpose.

(3) A creditor whose rights are restricted by this section is entitled to rank as an unsecured creditor for any balance of claim due him.

8. Re Lewis' Department Store Ltd. (1973), 17 C.B.R. (N.S.).

9. R.S.O. 1980, c. 137.

10. Re Campeau Corporation and Provincial Bank of Canada (1975), 7 O.R. (2d) 73.

11. R.S.O. 1980, c. 261, s. 3.

12. [1962] S.C.R. 487.

13. R.S.C. 1970, c. B-1.

14. Hammonds v. Barcley (1802) 2 East 227 per Grose J.

15. For example, in section 18(3) of the Legal Aid Act, R.S.O. 1980, c. 234, it is provided that upon the endorsement and entry of the certificate provided for under section 18(2) being made, the Law Society "... has a lien against ...the land ...of the debtor ..."

    The Mining Tax Act R.S.O. 1980, c. 269, in section 21 provides that all taxes, penalties and interest payable under ... the Act ...." are a special lien on the mine and upon all machinery upon or connected with the mine ... in priority to every claim, privilege, lien or encumbrance of any person, whether the right or title of such person has accrued before or accrues after the attaching of such lien ...."

    The Provincial Land Tax Act, R.S.O. 1980, c. 399 provides in section 26(1) that every tax, interest and penalty imposed by that Act "... is .... a special lien on the land upon or in respect of which .... such tax, interest or privilege, lien or encumbrance ... heretofore or hereafter created, of every person ...".

    The Public Utilities Act, R.S.O. 1980, c. 423 in section 30(1), provides that the amount payable ... to the Public Utility ..."is a lien and charge upon the estate or interest in such land of the person by whom the amount is owed ..."

The Local Improvement Act R.S.O. 1980, c. 250 in section 71 provides that the special assessment and the special rates charged or chargeable on land for or in respect of the cost of any work undertaken, to the extent that the same is in arrears and unpaid, "... is deemed to be an encumbrance upon the land ...".

16. For example, the term "first lien" is used in section 92 of the Corporation Tax Act R.S.O. 1980, c. 97; "special lien" is used in section 369 of the Municipal Act, R.S.O. 1980, c. 97; and "lien and charge" is used in the Manitoba Revenue Tax Act, S.M. 1972, c. 6, s. 19.

17. Compare, for example, section 18(3) of the Legal Aid Act with section 21 of the Mining Tax Act quoted in Note 12 above.

18. Compare, for example, section 18(3) of the Legal Aid Act with section 21 of the Mining Tax Act.

19. [1979] 2 S.C.R. 699.

20. S.B.C. 1962, c. 45, s. 5 amended 1970, c. 35, s. 7; 1973, c. 68, s. 6; 1976, c. 2, s. 26 and 5A, re-enacted 1973, c. 68, s. 7; consolidated in the Employment Standards Act, R.S.B.C. 1979, c. 51, s. 114 and now see s. 15 of the Employment Standards Act, S.B.C. 1980, c. 10 which allows the lien to take priority over prior secured interests in personal, but not real, property.

21. [1979] 2 S.C.R. 699 at 706. This passage was cited with approval by the majority of the Supreme Court of Canada in Re Bourgault (1979), 105 D.L.R. (3d) 270, 278, and by a majority of the Court in Dauphin Plains Credit Union Ltd. v. Xyloid Industries Ltd. et al. (1980), 108 D.L.R. (3d) 257, 263.

22. S.B.C. 1968, c. 59, s. 49, amended 1972, c. 64, s. 25, 1974, c. 101, s. 26 and 1975, c. 81, s. 9, consolidated R.S.B.C. 1979, c. 437, s. 52.

It is noted that in Gatsby Enterprises (Kelowna) Ltd. v. Gatsby Kelowna (1976) Ltd. and Canadian Imperial Bank of Commerce (1978)30 C.B.R. (N.S.) 1, the British Columbia Supreme Court held that the lien imposed by the Workers' Compensation Act took priority over all prior liens, charges or mortgages, including fixed charges that had been previously registered.

23. (1979), 105 D.L.R.(3d) 270.

24. R.S.Q. 1964, c.71.

25. [1985], 4 W.W.R. 481; (1985) 55 C.B.R. 241.

26. The Workers' Compensation Act, 1973 (Alta.), c.87, s.78(4) provides:

> Notwithstanding anything in any other Act, the amount due to the Board by an employer upon an assessment made under this Act or in respect of any amount that the employer is required to pay to the Board under any of its provisions or upon any judgment for that assessment or amount,
>
> (a) is a charge upon the property or proceeds of the property of the employer, including moneys payable to, for or on account of the employer, within Alberta, and
>
> (b) has priority over all assignments by way of security, debts, liens, charges, mortgages or other encumbrances whatsoever, whenever created or to be created, except wages due to workers by their employer in cases where the exercise of the priority would deprive the workers of their wages.

27. [1928] A.C. 187 (P.C.).

28. [1962] S.C.R. 676.

29. pages 497-498 (W.W.R.).

30. [1977] 2 S.C.R. 1054.

31. Underhill's Law Relating to Trusts and Trustees, 12th edition by R.T. Oerton, London: Butterworths, 1970, page 3.

32. Re Halletts Estate, (1880) 13 Ch. D 696.

33. 15 D.L.R. 2nd 681, 684.

34. (1980), 108 D.L.R.(3d) 257.

35. The provisions of the legislation that were the focus of the discussion in the case read as follows:

    1. Section 227(4) and (5) of the Income Tax Act, S.C. 1970-71-72, c. 63:

        (4) Every person who deducts or withholds any amount under this Act shall be deemed to hold the amount so deducted or withheld in trust for Her Majesty.

        (5) All amounts deducted or withheld by a person under this Act shall be kept separate and apart from his own moneys and in the event of any liquidation, assignment or bankruptcy the said amounts shall remain apart and form no part of the estate in liquidation, assignment or bankruptcy.

    2. Sections 24(3) and (4) of the Canada Pension Plan Act, R.S.C. 1970, c. C-5, s. 22(1) re-enacted by 1974-75, c. 4, s. 15(1) and s. 24, as amended by 1974-75, c. 4:

        (3) Where an employer has deducted an amount from the remuneration of an employee as or on account of any contribution required to be made by the employee but has not remitted such amount to the Receiver General, the employer shall keep such amount

separate and apart from his own moneys and shall be deemed to hold the amount so deducted in trust for Her Majesty.

(4) In the event of any liquidation, assignment or bankruptcy of an employer, an amount equal to the amount that by subsection (3) is deemed to be held in trust for Her Majesty shall be deemed to be separate from and form no part of the estate in liquidation, assignment or bankruptcy, whether or not that amount has in fact been kept separate and apart from the employer's own moneys or from the assets of the estate.

3. Sections 71(2) and (3) of the Unemployment Insurance Act, 1971, S.C. 1970-71-72, c. 48:

(2) Where an employer has deducted an amount from the remuneration of an insured person as or on account of any employee's premium required to be made by the insured person but has not remitted such amount to the Receiver General, the employer shall keep such amount separate and apart from his own moneys and shall be deemed to hold the amount so deducted in trust for Her Majesty.

(3) In the event of any liquidation, assignment or bankruptcy of an employer, an amount equal to the amount that by subsection (2) is deemed to be held in trust for Her Majesty shall be deemed to be separate from and form no part of the estate in liquidation, assignment or bankruptcy, whether or not that amount has in fact been kept separate and apart from the employer's own moneys or from the assets of the estate.

4. Sections 1(h) and 7(1) of the Manitoba Payment of Wages Act, S.M. 1975, c. 21 (continuing consolidation c. P15), as amended by S.M. 1980, c. 57:

> (h) "wage" or "wages" includes salaries, commissions, or any compensation for labour or services measured by time, piece, or otherwise, and any pay which is due and payable to an employee including moneys payable under The Vacations With Pay Act or moneys payable in cases of termination of employment under The Employment Standards Act; but does not include any deductions for wages that may be lawfully made by an employer.
>
> . . . . .
>
> 7(1) Notwithstanding any other Act, the amount of wages due and payable by an employer to an employee not exceeding $2,000.00 constitutes a lien and charge on the property and assets of the employer in favour of the employee, and is payable in priority to any other claim or right, including those of the Crown in right of Manitoba, and without limiting the generality of the foregoing that priority extends over every assignment, including an assignment of book debts, whether absolute or otherwise, every mortgage on real or personal property, and every debenture.

36. 13 D.L.R. (3d) 551.

37. [1962] S.C.R. 487, 494.

38. (1983), 48 C.B.R. (N.S.) 113.

39. (1981), 37 C.B.R. (N.S.) 176, affirmed (sub. nom. Director of Labour Standards of Nova Scotia and Workers' Compensation Board of Nova Scotia v. Trustee in Bankruptcy) 38 C.B.R. (N.S.) 253 (N.S.C.A.).

40. (1981), 41 C.B.R. (N.S.) 1 (B.C.C.A.).

41. (1981), 39 C.B.R. (N.S.) 247 (B.C.S.C.), additional reasons at (1981) 41 C.B.R. (N.S.) 188 (B.C.S.C.).

42. (1982), 42 C.B.R. (N.S.) 135 (B.C.S.C.).

43. [1973] 1 O.R. 603 (S.C.).

44. (1977), 36 A.P.R. 605 (N.S.S.C.T.D.).

45. (1980), 27 B.C.L.R. 149 (S.C.).

46. (1982), 42 C.B.R. (N.S.) 259, affirmed 43 C.B.R. (N.S.) 232 (Ont. S.C.).

47. R.S.O. 1970, C. 147 [Act repealed 1974, c. 112, s. 67].

48. [1973] 1 O.R. 603, at pp. 605-606.

49. R.S.N.S. 1967, c. 343, s. 125 [re-en. 1968, c. 65, s. 1(1); am. 1978-79, c. 38, s. 1].

50. Section 34 [am. 1975, c. 50, s. 2] of the Labour Standards Code, 1972 (N.S.), c. 10.

51. Re Reed and Franco, [1980] Que. S.C. 391, 35 C.B.R. (N.S.) 149 (sub. nom. Re Reed; Franco v. Dep. Min. of Revenue (Que.)) dealing with a statutory hypothec; and Re Indust. Rel. Bd. and C.I.B.C. (1980), 116 D.L.R. (3d) 71, affirmed 38 C.B.R. (N.S.) 126 (B.C.C.A.) dealing with a claim based on a statutory lien for unpaid wages owed to the employees of the bankrupt.

52. (1981), 37 C.B.R. (N.S.) 176 at 192.

53. 38 C.B.R. (N.S.) 253, at 257.

54. R.S.B.C. 1979, c. 437, s. 52(1).

55. R.S.B.C. 1960, c. 361 [now the Social Service Tax Act R.S.B.C. 1979, c. 388], s. 19 [re-en. 1978, c. 7, s. 5; now s. 18].

56. (1981), 39 C.B.R. (N.S.) 247, 255.

57. In coming to the conclusion that section 18 of the Social Service Tax Act does not create a debt in favour of the Crown with respect to moneys collected relating to the tax imposed by the Act, but that such moneys are impressed with a trust in favour of the province (so that from the moment they are received by a vendor they are not his property except subject to the trust), Hardinge L.J.S.C. quoted from the judgment of Mr. Justice Hart in Re KRA Restaurants Ltd.:

> It appears from the various authorities that the Courts have consistently approved the right of both the federal Parliament and the provincial Legislatures to utilize the technique of a legislative trust to keep certain amounts from becoming part of the bankrupt's estate in the hands of its trustee. (page 620, A.P.R.)

58. Dauphin Plains (1980), 108 D.L.R. (3d) 257, 269.

59. Ibid., at 270.

60. Re Reimer (1980), 27 B.C.L.R. 149, 156.

61. Section 47(a) of the Bankruptcy Act states:

> 47. The property of a bankrupt divisible among his creditors shall not comprise
>
> (a) property held by the bankrupt in trust for any other person ...

62. (1983), 48 C.B.R. (N.S.) 113, 127-128.

APPENDIX II

WAGE PROTECTION

IN

OTHER JURISDICTIONS

WORKING CONDITIONS
AND ANALYSIS SECTION,
EMPLOYMENT STANDARDS BRANCH,
ONTARIO MINISTRY OF LABOUR,
NOVEMBER 1984

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I. WAGE PROTECTION IN OTHER NATIONS

Since the late 1960's a growing number of market-economy countries have introduced wage protection funds to compensate workers for sums due to them in the event of the bankruptcy or other insolvency of their employer. The trend began with Belgium's creation of a compensation guarantee fund in 1967, followed by: the Netherlands in 1968; Sweden in 1971; Denmark in 1972; Finland and Norway in 1973; France and Germany in 1974; Britain, Israel, Japan and Spain in 1976; Austria in 1977; Luxemburg and Greece in 1981; Italy (for severance pay only) and Switzerland in 1982; Ireland in 1984 and Portugal (legislation passed) will implement a scheme in 1985.

In countries creating wage protection funds in the 1960's and 1970's the motivation to legislative action appears to have been the prior low rates of payment of wage claims due to insolvency, usually only 10% to 20%, sometimes brought to public attention by particular large insolvency cases or groups of cases involving serious wage losses. Generally, these losses had grown along with the growth of collectively bargained or legislated entitlements such as termination notice pay, vacation pay, redundancy or severance pay and (employers' contributions to) pensions and other benefit plans.

In 1980 the European Economic Community adopted a Directive requiring Member States to guarantee employees' claims through assets independent of the employer's operating capital. Workers' wages could no longer be allowed to compete with other claimants for whatever assets could be recovered from insolvent employers. Rather, the state or a guarantee fund would pay the wage claims and, in turn, be subrogated to the employees' rights of claim upon the employer's assets. Member States were required to take steps necessary to comply with the Directive before the end of October 1983. Countries creating wage protection funds in the 1980's appear to have done so, at least in part, in order to conform with the E.E.C. Directive, either as members or as prospective members of the Community.

In sharp contrast to this emerging wage protection model, the United States, Australia and New Zealand continue, with little exception, to treat wage claims in essentially the same fashion as other claims pursuant to an employer's insolvency. A special priority is accorded to wage claims, but that priority is effective only on whatever assets remain after realization by secured creditors such as financial lending institutions. It is perhaps indicative of the reasons behind the lack of reform legislation in these three jurisdictions that none of them have documented the extent of wage losses due to insolvency cases. It is also perhaps suggestive that workers' entitlements to vacation pay, termination pay and severance pay are generally far less extensive than in countries which have followed the wage protection fund model which secures these entitlements in whole or in part.

The characteristics of the E.E.C. Directive and of the various national plans are discussed below.

Reasons for Legislation

In 1977 the E.E.C. Commission reported to its governing Council of Ministers that wage protection guarantee funds were necessary because:

> 1) Experience has shown that in many cases the assets of the bankruptcy are not sufficient to meet outstanding claims arising from the employment relationship even where they have a preferential ranking. There is certainly scarcely a chance of covering from the bankruptcy assets claims which have arisen but which will become due only at a future date, eg. those arising from an occupational retirement pension scheme. It should however be noted in this connection that the income situation of the employee is fundamentally different from that of all other groups of persons with incomes. The employee is specifically dependent exclusively on his capacity for work in return for remuneration; he cannot usually have recourse to other sources of income. Where the agreed and expected consideration for his labour is not forthcoming, then he is at the same time deprived of the basis for his material existence.
>
> 2) Bankruptcy proceedings often take a very long time. The employee is however dependent for the above reasons on regular payments for his labour. His having to wait for the perhaps partial satisfaction of his claims from the employment relationship until the end of the bankruptcy proceedings represents at least a temporary threat to the livelihood of himself and his family.
>
> 3) The employee cannot usually grasp the practical intricacies of the bankruptcy proceedings. He cannot usually be expected to bear the considerable cost of a lawyer representing him in the proceedings. He has thus very little chance of realising satisfactorily even promising claims against the liquidator.
>
> 4) The employee is completely unprotected where the employer's insolvency does not lead to bankruptcy proceedings, either because there are no bankruptcy assets at all for distribution or because the employer is able to avoid bankruptcy proceedings by concealing his inability to pay. Particularly in the case of companies, there is a great danger that the economic situation will be obscured by transactions involving the company's capital.

In Austria the Minister of Social Affairs stated that legislation had become essential because workers had previously received only one-fifth of their claims in the event of bankruptcy.

In France a report to the National Assembly Commission on Cultural, Family and Social Affairs (henceforth the "Caille Report", after Rene Caille, Commission vice-chairman and report author), stated that even a "super-preferred" priority for 60 days wages was "often illusory since it can only be used in so far as funds are available [emphasis in original]".

The General Social Affairs Inspectorate of France reviewed the claims of all salaried workers that were due to insolvencies in 1972 and concluded that 19% of super-preferred, 82% of preferred and 96% of general unsecured wage claims remained unpaid. In total, this meant that only 39% of salaries owing were paid. Of the 30,500 salaried workers affected, 10,400 had received nothing. The remaining 20,100 workers who received all or part of their claims had to wait considerable periods - the average waiting period between filing a judicial decree and trustee's closure was 37 months.

The legislation to create a guarantee fund was recommended by the Commission "in order to remedy the inconveniences we have just noted". The spur to immediate action was the "Lip affair" which "illustrated...(these inconveniences) in a particularly annoying fashion" and came to public attention when 1300 workers at the Lip watch company made French industrial history by taking over the company earlier in 1973.

In Germany the wage losses of employees as a result of bankruptcies prior to the 1974 protections of the Bankruptcy Deficiency Law fluctuated between DM 20 million and DM 50 million ($9 to 21 million) in spite of wage guarantees through collective bargaining in some industries.

In Sweden a 1981 report by the Federation of Approved Unemployment Insurance Funds (henceforth referred to as the Swedish Insurance Fund Report) gave the reasons for legislation as follows:

> It has long been agreed that it is of the utmost importance, on social grounds, that any unsettled wage claims on the part of the employees and equivalent persons should be discharged. This was previously reflected in the legislation by the fact that such claims were practically the most privileged of all claims in cases of bankruptcy. Experience showed, however, that the employees were even so left to a

> fairly considerable extent without payment if the employer became insolvent. The assets in the bankruptcy were often insufficent to meet even the wage claims. A system involving a national wages and salaries guarantee was therefore introduced as from 1971.01.01.
>
> Prior to that time, the labour organisations had their own funds with which to secure the wage claims of their members in cases of bankruptcy. The system with a national wages guarantee thus fulfilled a long-expressed want on the part of the labour organisations.

In Switzerland 50% of sums due to employees in 1977 remained unpaid in the event of bankruptcy and wage protection was subsequently introduced as part of an incremental plan for compulsory unemployment insurance for all workers, in order to minimize the impact of recessions.

Finally, in the United Kingdom it was reported that even a preferential wage claim status effective before some secured creditors solved neither the problem of ensuring all payments nor the problem of timeliness of payment. Both these problems were expected to worsen as the new rights conferred upon employees by the Employment Protection Act (e.g. medical suspension pay, maternity pay) were phased into force.

Guarantee Laws & Institutions

The 1977 E.E.C. Commission report set out guidelines for guarantee institutions as follows:

> To achieve the above-mentioned objectives, provision must be made to ensure that in the event of an employer's insolvency the claims of the employees arising from the employment relationship are met by institutions which are independent of the financial position of individual employers. In addition there must be a guarantee through asset adminstration provisions that these institutions always have the required cover for employees' claims. In order to achieve this, the following minimum organisational requirements must be taken into account:
>
> Having regard to previous experience in some Member States, a choice could be made between the following alternative types of guarantee institutions under an obligation to pay:
>
> i) to create special social security institutions or to entrust tasks relating to the deficiency guarantee to existing social security institutions;
>
> ii) to introduce by law a private compulsory insurance scheme for employers on behalf of their employees. The way in which this compulsory insurance is carried out, eg. through existing insurance undertakings or through insurance organisations set up especially for this purpose by the two sides of industry, should be left to the Member

States.

- - - - - - - - - - - - - - - -

> The question may be left whether representatives of the employers and employees should participate in the administration of the guarantee fund in accordance with the principles of self-administration. All Member States which have so far introduced the deficiency guarantee system by law provide for such self-administration.

These guidelines were so-worded as to allow Member States which had already set up suitable institutions to maintain, to a large extent, their existing sytems.

Generally speaking, these quarantee institutions are modelled on social security principles: the necessary funds are obtained by compulsory contributions collected and sometimes administered as part of the unemployment insurance scheme. The closeness of the relationship to the unemployment insurance system appears to depend on the nature of the funding: where funding is joint, by employers and employees, the wage protection scheme may, for all practical purposes, be integrated with the unemployment insurance scheme; where funding is made solely by employers (the most common form) the wage protection scheme will be theoretically independent, but practically an adjunct of the unemployment insurance scheme.

Greece, the Netherlands (employer funded but closely integrated with unemployment insurance), Switzerland and the United Kingdom are examples of the first of these models while Austria, Belgium, Finland, France, Ireland, Spain and Sweden better fit the second model. Countries that have avoided significant unemployment insurance linkages are Denmark, where the link is to the occupational pension scheme, and Germany, where the link is to workers' compensation. For the remaining four countries available information is insufficient to classify the nature of the scheme.

The guarantee funds, laws, and institutions in the various countries are:

Austria	- The Insolvency Compensation Fund, created by the Insolvencey (Guarantee of Remuneration) Act, 1977; administered by the Federal Ministry of Social Administration.
Belgium	- The Compensation Fund for Workers Dismissed as a Result of the Closure of the Firm, created by an Amendment on 30.6.67 to the Law on Protection of Wages, administered by the National Employment Board.

Denmark	- The Employees' Guarantee Fund, created by Law Number 116 of 13.4.72 amending the Bankruptcy Rules, administered by the Arbejdsmarkedets Tillaegspension (ATP), the managing institution for occupational pensions.
Finland	- The Unemployment Insurance Fund, use governed by the Pay Security Act, 1973, with administration through the Manpower Ministry and the Federation of Unemployment Insurance Funds.
France	- The AGS, part of the unemployment insurance fund, use governed by Labour Code and Law No. 73 - 1194 of 27.12.73, administered primarily by ASSEDIC, the Association for Employment in Industry and Commerce.
Germany	- The Bankruptcy Indemnification Fund, created by the Bankruptcy Deficiency Law, 1974, administered by the Federal Labour Institute and the Federations of Employers Mutual Insurance Associations.
Greece	- The unemployment insurance fund, use governed by the Law on Protection of Employees in Bankruptcy or Insolvency, 1981, adminstered by the Manpower and Employment Organization (OAED).
Ireland	- The Redundancy and Employers Insolvency Fund, created by the Irish Protection of Employees (Employers Insolvency) Bill, 1984, to be administered by the Department of Labour.
Israel	- The unemployment insurance fund, use governed by the National Social Insurance Act, administered by the National Insurance Institute.
Italy	- A guarantee fund for severance payments, administered by the National Social Security Institute, under a 1982 law, name not known.

Japan - A wage guarantee fund, created by the Law Concerning the Security of Wage Payments, is administered by the Rodo Fukushi Jigyo Dan.

Luxemburg - Fund confirmed, name, etc. not known.

Netherlands - The Unemployment Insurance Fund, use governed by the Law of 10.7.68 amending the Unemployment Law, administered by the occupational associations which administer unemployment insurance.

Norway - The National Insurance Fund and the Annual Holidays Fund, use governed by the State Guarantee for Wage Claims in the Event of Bankruptcy Act, 1973, administered by the Labour Department and the Department of National Insurance.

Portugal - Fund confirmed, legislation effective 1985, name etc. not known.

Spain - The Employees' Guarantee Fund, created by Royal Decree No. 2077/1979, administered by the National Insurance Agency.

Sweden - The Wage Guarantee Fund, created by the Act on Governmental Wage Guarantees in Cases of Bankruptcy, 1970, administered through the Crown Lands Judiciary Board and the County Administrations (LST).

Switzerland - The Unemployment Insurance Fund, use governed by the Federal Act respecting Compulsory Unemployment Insurance and Insolvency Benefit, 1982, administered by the Federal Industry and Labour Office.

United-Kingdom - The Redundancy Fund, use governed by the Employment Protection Acts, administered by the Department of Employment.

Field of Application

The field of application for this wage protection is set out in the E.E.C. Directive under the generic concept of "insolvency" rather than under any more formal, less limited concept such as "bankruptcy". The scope and definitions of the Directive are, in part;

> **Article 1**
>
> 1. This Directive shall apply to employees' claims arising from contracts of employment or employment relationships and existing against employers who are in a state of insolvency within the meaning of Article 2(1).
>
> **Article 2**
>
> 1. For the purposes of this Directive, an employer shall be deemed to be in a state of insolvency:
>
>   (a) where a request has been made for the opening of proceedings involving the employer's assets, as provided for under the laws, regulations and administrative provisions of the Member State concerned, to satisfy collectively the claims of creditors and which make it possible to take into consideration the claims referred to in Article 1(1), and
>
>   (b) where the authority which is competent pursuant to the said laws, regulations and administrative provisions has:
>   - either decided to open the proceedings,
>   - or established that the employer's undertaking or business has been definitively closed down and that the available assets are insufficient to warrant the opening of the proceedings.

In Austria the legislation specifically covers claims under four types of insolvency: 1) bankruptcies; 2) receiverships; 3) cases of "the refusal of an application for the institution of bankruptcy proceedings owing to the absence of sufficient assets"; and, 4) the institution of composition proceedings. Due to this fourth type of coverage it is clear that the employer need not terminate his business in order for the wage protection guarantee to apply. As long as the employer can pay at least 40 per cent of his debts, his employees' claims for wages up to the opening of composition proceedings are protected. If the firm cannot pay at least 40% of its debts then composition is denied.

In Belguim, also, formal bankruptcy is not a precondition for recognizing entitlement: the law allows recourse to the fund in the event of the "closure of a firm" defined to occur when there is "final suspension of the main activity of the firm or of one of its divisions" and "reduction [of staff] to less than one quarter of the average number of employees... in the preceding calendar year". Recourse to the fund may be allowed by Ministrial derogation even if these conditions are not fulfilled.

In Denmark, also, formal insolvency is not a necessary condition for payment from the wage protection fund; the Danish system recognizes cases of "bankruptcy of the employer, death..., liquidation of a limited company... supsension of activity, if it is established that the employer is unable to meet his financial obligations." Unlike Austria, and Belgium, however, Denmark apparently limits its wage protection guarantee to cases where the employer's business is totally and finally terminated. If there is no formal date on which this has occurred, the competent authorities will deem a date.

Finland casts its legislative definition of insolvency widely to cover not only bankruptcy but, in impressive detail:

> An employer shall be deemed to be insolvent if -
>
> 1) he has died and his estate has been placed in the hands of an executor and it can be established that the necessary amount cannot be paid out of his assets;
>
> 2) his activity has ceased and it can be established that the necessary amount cannot be paid out of his assets;
>
> 3) it is established in proceedings for the recovery of a debt that he lacks the requisite assets to pay the necessary amount;
>
> 4) he has left the country or is in hiding and it is impossible to find a sufficient amount to pay any claim against him;
>
> 5) he has failed to meet prescribed tax deductions or social insurance or pension insurance contributions at the appropriate time; or
>
> 6) his inability to pay in any other case that is comparable with those referred to in this paragraph can be clearly and sufficiently established by the authority responsible for the guaranteed payment of wages.

The inclusion of the fourth category, covering absconding employers, and the sixth, catch-all category are clear indications that the intent of wage protection is not to be frustrated by the informalities that characterize many small business closures.

The fifth category, indeed, does not even necessitate closure or composition.

France, in contrast, exemplifies one of the most restrictive formulae. A claim for payment against the deficiency guarantee institutions is possible only where it arises from formal proceedings, liquidation or judicial composition when "a legal ruling on the wind-up of a firm has been issued".

In Germany a claim in respect of wages may be accepted on the opening of bankruptcy proceedings or in the absence of such proceedings, where a bankruptcy application has been refused due to lack of assets even without a cessation of business by the firm.

In Greece a collective aspect is added. Before workers can claim compensation, two preconditions must be satisfied. First, the employer must have been officially declared bankrupt or he must have stopped paying wages due to apparent lack of funds. Second, a "general" social interest must be involved - not just one or two individuals, but most of the workforce. Payments are not automatic, but must be approved by the Labour Minister after consultation with an advisory committee responsible for assessing the true state of the apparent insolvency.

In Ireland, also, the Minister has been given some discretionary authority. Formal bankruptcies, arrangements, receiverships, and cases of death of the employer are listed as being insolvencies for purposes of the Act, but the Minister may also "specify the circumstances in which employers who are of a class or description specified in the regulations are, for purposes of the Act, to be taken to be, or to have become, insolvent."

In Israel protection is extended to employees whose employer has become bankrupt or has been dissolved.

In Japan there is a distinction based on the size of the enterprise. In the case of larger employers legal bankruptcy is required, but in the case of smaller employers "virtual" (no definition available) bankruptcy qualifies workers for wage protection.

In the Netherlands and in Norway, also, any type of insolvency is covered.

In Portugal, coverage is extended to bankruptcy and, as well, to "other" insolvencies.

In Spain, however, an employee's claims must itself be accompanied by a "copy of the court's pronouncement of bankruptcy, insolvency or suspension of payments," and in Sweden coverage requires that bankruptcy proceedings be opened and a trustee nominated to take charge.

By contrast, Switzerland's provisions on benefit entitlement appear as liberal as they are straightforward.

> Contribution [to U.I.] paying employees of an insolvent employer who is subject to execution proceedings in Switzerland or who has employees in Switzerland shall be entitled to insolvency benefits if -
>
> a) insolvency proceedings are instituted against their employer, and they have outstanding claims for renumeration against him at that time, or
>
> b) they have submitted an application for an attachment often for wage claims against their employer.

Finally, in the United Kingdom, coverage is extended to cover all formal situations - bankruptcy, receivership, composition, appointment of a liquidator or other administrator by the courts - but, at least apart from Redundancy pavments, is strictly limited to those cases. Smaller, informal insolvencies may not qualify and no flexibility is extended to the Minister or administrative authorities.

Coverage of Employees

The coverage of industries and employees is extremely broad. The E.E.C. Directive provides that (Article 1(2)):

> Member States may, by way of exception, exclude claims by certain categories of employee from the scope of this Directive, by virtue of the special nature of the employee's contract of employment or employment relationship or of the existence of other forms of guarantee offering the employee protection equivalent to that resulting from this Directive.

But these "certain categories" are then enumerated, separately for each Member State, in an Annex to the Directive. This Annex is worth reproducing if only to show the narrow extent of the exceptions contemplated.

ANNEX

Categories of employee whose claims may be excluded from the scope of this Directive, in accordance with Article 1(2)

I. Employees having a contract of employment, or an employment relationship, of a special nature

A. GREECE

The master and the members of a crew of a fishing vessel, if and to the extent that they are remunerated by a share in the profits or gross earnings of the vessel.

B. IRELAND

1. Out-workers (ie. persons doing piece-work in their own homes), unless they have a written contract of employment.
2. Close relatives of the employer, without a written contract of employment, whose work has to do with a private dwelling or farm in, or on, which the employer and the close relatives reside.
3. Persons who normally work for less than 18 hours a week for one or more employers and who do not derive their basic means of subsistence from the pay for this work.
4. Persons engaged in share fishing on a seasonal, casual or part-time basis.
5. The spouse of the employer.

C. NETHERLANDS

Domestic servants employed by a natural person and working less than three days a week for the natural person in question.

D. UNITED KINGDOM

1. The master and the members of the crew of a fishing vessel who are remunerated by a share in the profits or gross earnings of the vessel.
2. The spouse of the employer.

II. Employees covered by other forms of guarantee

A. GREECE

The crews of sea-going vessels.

B. IRELAND

1. Permanent and pensionable employees of local or other public authorities or statutory transport undertakings.
2. Pensionable teachers employed in the following: national school, secondary schools, comprehensive schools, teachers' training colleges.
3. Permanent and pensionable employees of one of the voluntary hospitals funded by the Exchequer.

C. ITALY

1. Employees covered by benefits laid down by law guaranteeing that their wages will continue to be paid in the event that the undertaking is hit by an economic crisis.
2. The crews of sea-going vessels.

D. UNITED KINGDOM

1. Registered dock workers other than those wholly or mainly engaged in work which is not dock work.
2. The crews of sea-going vessels.

Generally, the wage guarantee is extended to all workers, or all workers covered by the state unemployment insurance scheme. This is the case in Belgium ("workers with a contract of employment"), Denmark, Finland, France ("holders of an employment contract"), Germany ("workers and salaried employees working in return for a wage or undergoing vocational training"), Greece, Ireland, (all workers "ensurable for benefits" under the Irish Welfare Acts), the Netherlands ("employees compulsory covered by unemployment insurance legislation and employees over 65"), Switzerland and the United Kingdom.

In Japan the workers covered are those of employers participating in the Workmen's Accident Compensation Insurance Scheme.

In Austria protection is not limited to employees. It extends to "workers, former workers and their survivors (claimants)" in addition to homeworkers and "persons similar to workers" as defined in the Labour Courts Act. The extension to former workers is commonly found de facto in other national wage protection schemes, but the coverage of the claims of surviors is found elsewhere only in Sweden. It is more characteristic of bankruptcy law than of labour law, as is the extension to persons similar to workers. The latter includes certain commercial agents, accountants paid by the hour, economic consultants and others whose economic status is perhaps best characterized as that of dependent contractors.

In Sweden, and in some other countries by reference to bankruptcy law provisions, certain employees are excluded from the guarantee:"... any employee who himself or through a closely related person, owned an essential share of the business and had an essential influence over its operations."

Coverage of Wage Categories

The E.E.C. Directive does not define wages but the 1977 E.E.C. Commission Report set forth that:

> There is agreement among the Member States that all claims having their basis in the contract of employment or in the employment relationship are protected against the employer's insolvency, eg., in addition to the actual remuneration for the work done, the continued payment of wages in the event of sickness, holiday pay and any additional holiday pay, bonuses, compensation for restraints of trade, compensation for dismissal and leaving and seniority indemnities.

and

> Where under the laws of the Member States relating to social security and its supplement schemes the employee would suffer disadvantages in the event of the failure of the employer to pay contributions, outstanding contributions should also be covered by the special deficiency guarantee institutions. Reductions in the normal benefits and the disregard of qualifying periods in which contributions are not paid should be considered to be such disadvantages.

The E.E.C. Directive codifies the coverage of social security schemes, as follows:

> **Article 6**
> Member States may stipulate that [the guarantee] shall not apply to contributions due under national statutory social security schemes or under supplementary company or inter-company pension schemes outside the national statutory social security schemes.
>
> **Article 7**
> Member States shall take the measures necessary to ensure that non-payment of compulsory contributions due from the employer, before the onset of his insolvency, to their insurance institutions under national statutory social security schemes does not adversely affect employees' benefit entitlement in respect of these insurance institutions in as much as the employees' contributions were deducted at source from the remuneration paid.
>
> **Article 8**
> Member States shall ensure that the necessary measures are taken to protect the interests of employees and of persons having already left the employer's undertaking or business at the date of the onset of the employer's insolvency in respect of rights conferring on them immediate or prospective entitlement to old-age benefits, including survivors' benefits, under supplementary company or inter-company pension schemes outside the national statutory social security schemes.

In practice, subject to time and monetary limits discussed elsewhere, the breadth of agreement to cover all wage compensation, concisely described in France as "the wage and its adjuncts," is impressive and extends beyond the countries canvassed for the E.E.C. Commission Report. It includes Austria, Belgium, Denmark, Finland, France, Germany (which excludes some severance pay), Greece, Ireland, Israel, Japan, Luxemburg (severance pay excluded) the Netherlands, Norway (which even adds "any interest and expenses connected with prosecution of [wage] claims") Spain (originally, but somewhat cut back in 1979), Sweden, Switzerland (which excludes severance pay) and the United Kingdom. Interestingly, the coverage frequently extends even to awards in compensation for unjust dismissal; in Austria, Belgium, France, Germany, Ireland, Norway and Sweden (these two countries only to the extent it relates to loss of income), and the United Kingdom.

Only Italy is a clear exception, since the wage guarantee extends only to severance pay, and thus Italy does not conform with E.E.C. requirements. In balance, however, it should be noted the Italian severance pay entitlements can be substantial and there does not appear to be any maximum on the guarantee.

Limits on Wage Coverage

The limits on the wage guarantees are sometimes tied to time as well as to monetary totals. Frequently, these limits are achieved by reference to other legislation such as general bankruptcy or social security laws. The interpretation and application of these limits has proven a fertile ground for controversy and legal challenge.

Even the E. E. C. Directive provisions are convoluted, as follows:

> **Article 3**
>
> 1. Member States shall take the measures necessary to ensure that guarantee institutions guarantee, subject to Article 4, payment of employees' outstanding claims resulting from contracts of employment or employment relationships and relating to pay for the period prior to a given date.
>
> 2. At the choice of the Member States, the date referred to in paragraph 1 shall be:
>   - either that of the onset of the employer's insolvency;
>   - or that of the notice of dismissal issued to the employee concerned on account of the employer's insolvency;
>   - or that of the onset of the employer's insolvency or that on which the contract of employment or the employment relationship with the employee concerned was discontinued on account of the employer's insolvency.
>
> **Article 4**
>
> 1. Member States shall have the option to limit the liability of guarantee institutions, referred to in Article 3.
>
> 2. When Member States exercise the option referred to in paragraph 1, they shall:
>   - in the case referred to in Article3(2), first indent, ensure the payment of outstanding claims relating to pay for the last three months of the contract of employment or employment relationship occuring within a period of six months preceding the date of the onset of the employer's insolvency;
>   - in the case referred to in Article3(2), second indent, ensure the payment of outstanding claims relating to pay for the last three months of the contract of employment or employment relationship preceding the date of the notice of dismissal issued to the employee on account of the employer's insolvency;
>   - in the case referred to in Article3(2), third indent, ensure the payment of outstanding claims relating to pay for the last 18

> months of the contract of employment or employment relationship preceding the date of the onset of the employer's insolvency or the date on which the contract of the employment or the employment relationship with the employee was discontinued on account of the employer's insolvency. In this case, Member States may limit the liability to make payment to pay corresponding to a period of eight weeks or to several shorter periods totalling eight weeks.

3. However, in order to avoid the payment of sums going beyond the social objective of this Directive, Member States may set a ceiling to the liability for employees' outstanding claims.

   When Member States exercise this option, they shall inform the Commission of the methods used to set the ceiling.

In Austria there is no limit on the insolvency guarantee except that the claim must arise within three months following the institution of bankruptcy or other insolvency proceedings, less any statutory deductions. Deferred claims are deemed to be due. Where bankruptcy proceedings instituted on the closure of other proceedings are discontinued the period runs until the end of the third month thereafter.

In Belgium employees with at least 12 months service whose employment is ended within 12 months (manual workers) or 18 months (salaried workers) before the cessation of business and 12 months after (or three years after, if engaged in activities resulting from the cessation) are entitled to benefits of up to 650,000 francs($13,800) at the 1982 limit for contractual wage benefits plus, from a separate fund, severance pay of 3291 francs($70) per year of service, with a 20 year maximum and with a double payment for any completed service year from age 45.

In Denmark the guarantee in 1982 was 40,000 Kr($4,800) net of taxes plus outstanding vacation pay and pension contributions.

In Finland wages and other receivables due to employment are guaranteed when they "have become payable during the three months preceding the submission of the pay security claim" but the Minister is empowered to restrict the sum to "twice the amount the defaulting employer has paid to the employee due to his employment during the year preceding the submission of the pay security claim." In monetary terms the maximum amount of pay security per employee is also set by decree and in 1983 this maximum was 50,000 marks($10,000) plus severance pay.

In France there are ceilings on individual wage components involving various multiples of an indexed social security ceiling. Originally there was no general ceiling. Apart from otherwise guaranteed contributions to the social security funds themselves, however, there now is a general ceiling of 52 times the social security ceiling. In 1983 this resulted in a wage protection ceiling of 118,560 francs($16,600).

In Germany wages are guaranteed for the "three months prior to the institution of bankruptcy proceedings" (or the last three months of employment if the employment relationship is terminated earlier). A general monetary ceiling on individual payments is also being contemplated. Payments to "social plans" are separately guaranteed, including occupational pensions.

In Greece the maximum allowable claim is for six months wages plus one-half (presumably the employer's one-half) of normal social security contributions.

In Ireland there is no general maximum on the wage protection guarantee but ceilings are put on individual parts. For wages arising up to 18 months prior to the insolvency (or the termination of employment), protection is extended to 8 weeks wage arrears, 8 weeks sick pay, 8 weeks holiday pay, termination notice pay, severance pay, pension contributions (for 12 months before the insolvency) and awards relating to unjust dismissal, equal pay and sex discrimination. Where the debt is calculated on a weekly basis a weekly maximum of Irish pounds 211.54($280) applies.

In Israel "a portion" of the wages owed to the employee are guaranteed, the portion varying with inflationary changes.

In Italy coverage is limited to severance pay, however there is no reported maximum on the severance pay entitlement. It varies according to the number of years of service and according to whether the worker is manual or non-manual, but as from June 30, 1982 varies from approximately 2 weeks to 4 weeks wages per year of service, minus any advance received on the accrued entitlement prior to the termination.

In Japan the wage guarantee covers 80% of three months salary, originally to a cap of approximately $2,000, plus accrued severance pay and employee savings (both for which employers are required to buy insurance).

In Luxemburg workers are entitled to claim their current and subsequent months pay, after the date of the employer's insolvency, plus one-half their notice entitlement. The notice period ranges from 4 weeks (a manual worker with less than 5 years service) to 6 months (a non-manual worker with 10 years service). The maximum wage and notice pay guarantee, however, is only 150,000 francs ($3,200).

In the Netherlands the guarantee has no set monetary limit but covers wage arrears of 13 weeks before the date employment ceased, termination notice pay ranging from one pay period (minimum for all workers) to 26 weeks (maximum for workers age 58 and above), plus accrued vacation pay and benefit contributions for the previous 12 months.

In Norway wages and all other entitlements are guaranteed to an amount not to exceed three times the national insurance amount, thus 67,800 Crowns ($10,000) in 1983. Any wages earned elsewhere are deducted from the termination notice entitlement.

In Portugal, wages are guaranteed for the last four months of "pay arrears" in bankruptcies or other insolvencies.

In Spain wage arrears are guaranteed for four months before the date of insolvency and total benefits are limited to the equivalent of one year's pay.

In Sweden wage and pension claim arrears for the previous twelve months are covered as is termination notice pay for up to 6 months, plus holiday pay accrued over the three years prior to the bankruptcy, and "other reimbursement arising from the employment." This broad entitlement, however, is subject to a ceiling of 12 times the basic amount used for social security. That base amount is 20,500 Crowns ($3,100) resulting in a maximum of $37,200 but a special committee set up by the Swedish Government has recently recommended a 100,000 Crown ($15,000) maximum. As in Norway, wages earned elsewhere during the termination notice period are deducted from the notice pay entitlement.

In Switzerland the insolvency protection benefit is limited to wage claims, allowances, and statutory contributions in respect of the last three months preceding the institution of bankruptcy or the application for an attachment order. This protection is further limited to the maximum earnings under which unemployment insurance is assessed, and the termination notice pay postpones the period of unemployment insurance benefit entitlement.

In the United Kingdom protected wage claims include up to:

(a) 8 weeks arrears of pay,
(b) 8 weeks of "guarantee" (not wage protection) payments, medical payments or protective awards,
(c) 6 weeks of holiday pay to which the employee became entitled in the previous 12 months,
(d) termination notice pay from one week (employees with 2 years service or less) to 12 weeks (employees with at least 12 years service),
(e) unfair dismissal awards,

(f) redundancy payments to a maximum in 1984 of 4350 pounds basic award ($6,900), and
(g) pension contributions payable in the preceding 12 months.

On each of claims "a" to "d" there is a 145 pounds($230) per week cap on the guarantee. The results in total caps of 1,160 pounds($1,850) on "a" and "b", 870 pounds($1,390) on "c", and 1,740 pounds($2,780) on "d".

Until 1983 the payments for termination notice were also reduced by any unemployment insurance benefits received and, to the potential detriment of the employee, the period of unemployment benefit eligibility was, in effect, reduced by the number of weeks for which the termination notice pay had been calculated. In 1983 the Court of Appeal prohibited the deduction from termination notice. In 1984 the House of Lords overturned that court decision, henceforth and retroactively allowing the deduction but ruling that the unemployment benefit eligibility period had to be extended for an equivalent time period.

Lodging and Paying Claims

The E. E. C. Directive is silent on the procedural questions of how employees are to lodge their wage claims and administrators are to pay them. These details are left to the Member States.

In Austria the employee applies to a local employment office near his residence or place of employment. All applications are then forwarded to the one local employment office which is competent to make a decision, usually located in the area of the insolvent employer. The employee is accorded four months from the relevant date of insolvency, etc. to make his application. This considerable time allowance is tied, perhaps, to a paperwork burden (found elsewhere only in Spain); a significant responsibility for proof is placed upon the employee and it would appear that legal advice (perhaps through the employee's labour organization) is necessary. The Austrian Insolvency (Guarantee of Renumeration) Act specifies that:

> Application shall be made in writing. Each application shall indicate the amount of the claim, the facts on which it is based and the evidence relied upon to substantiate it and, in case of claims which are or have been in dispute, it shall also indicate the court hearing the case and the reference number of the file and be accompanied by any

> available writ of execution. Where bankruptcy proceedings have been instituted and the guaranteed claim was part of the bankruptcy petition, a copy of the petition (section 103 of the Bankruptcy Code) bearing an endorsement to the effect that it has been received by the court and copies of the paper attached to it shall be appended to the application.

The competent local employment office then forwards a register of claims and, where appropriate, copies of the claims to the employer or receiver for verification. Only after verification are claims paid in full, although advances may have been paid earlier.

In Belgium, where bankruptcy is not a precondition for recognizing entitlement, the claim for compensation is lodged by the employee, but when a firm closes employee initiative is not necessarily required. Rather, the official receiver must inform the Fund of the closure and send a list of the employees affected.

In Denmark the employee is accorded four weeks to file a claim directly with the Gurantee Fund.

In Finland employees lodge their claims with the appropriate manpower office and, as specified in the legislation, the Ministry of Manpower:

> shall immediately take steps to establish the employer's insolvency and the debts based on the worker's employment relationship. The employer shall be afforded an opportunity of being heard while the matter is under consideration. Where the Ministry has been able to establish that the employer is insolvent and to determine the debts owing to the worker, it shall order order payment to be made immediately out of public funds in satisfaction of the claims based on the employment relationship.
>
> Where a worker has neglected to advance his claim or secure privileged treatment for it during the employer's bankruptcy proceedings or on the date fixed for claimants to declare themslves after a public invitation has been issued to the employer's creditors, the Ministry shall have the right to determine how far he should be regarded as having wholly or partly forfeited his right under the guarantee.
>
> Where a worker's claim can only be partly established, the debt shall be ordered to be paid to the extent established.

In sharp contrast to the state centred Finnish procedures, the French system, in which coverage is extended only to bankruptcies and other formal insolvencies, makes the trustee, receiver or liquidator responsible for determining what wage entitlements can not be paid out of liquid assets, for submitting the appropriate claims to the competent unemployment insurance association (ASSEDIC) and for paying the claims from guarantee funds provided to him. In essence wage protection is treated simply as an extension of the trustee's, receiver's or liquidator's other duties.

The German procedure is similar to the French. Although the employees may, within two months after the opening of the bankruptcy proceedings, apply for their wages to the local employment office, in practice that office avails itself of the services of the bankruptcy trustee. The Employment Promotion Act provides that:

> If so requested by the local employment office, the trustee in bankruptcy shall immediately, in respect of every employee who is entitled to claim payment in respect of wage debts in the event of bankruptcy, certify the amount of the remuneration due for the last three months before the opening of the bankruptcy proceedings and the amount of any statutory deductions and payments made in satisfaction of claims to remuneration; he shall also certify the extent to which the claims to remuneration have been attached, pledged or assigned. He shall use the form prescribed by the Federal Institution for the purpose.

and, later, that:

> If so requested by the local employment office, the trustee in bankruptcy shall immediately calculate and make the appropriate payments in respect of wage debts if suitable employees of the establishment are available to him for the purpose and the local employment office supplies the necessary funds for the payments to be made. In drawing up the settlement he shall use the form prescribed by the Federal Institution. Costs shall not be reimbursable.
>
> If no trustee is involved then the local employment office performs all necessary duties.

In Greece the focus is less upon assessing the eligibility of individual claims than it is on assessing the insolvency or other case of the employer's "apparent financial incapacity." It is the responsibility of workers to apply, variously to the Labour Ministry or the local office of the National Employment and Manpower Office (OAED), which will bring the matter to the attention of the Labour Ministry. The OAED is the agency that will assess and pay individual claims but not unless and until the Labour Minister has, after due consultations with an Advisory Committee, declared the insolvency to involve "general social interests."

In Ireland application is made to and payment is made by the Department of Labour. Where, however, a "relevant officer" has been appointed (trustee, receiver, liquidator, executor or official assignee) the Department will not pay the claim until that officer has provided a statement, in prescribed form, of wages owing.

In the Netherlands application for payment is made by the employee, directly to the industrial association in charge of implementation of the employers' social security programs.

In Norway employees apply for the payment directly to the employer or trustee, receiver, etc. who is "afforded an opportunity" of contesting the claims or any part of it.

In Sweden the 1981 Insurance Fund Report describes two different ways in which claims are received and processed, as follows.

In minor bankruptcies employee claims "can be referred very informally" to the District Distraint Authority(KFM), which is "required to consider on its own initiative whether the quarantee is to be applied as soon as the claim 'becomes known' to the authority." The KFM investigation and examination of claims is not standardized but rather adapted to the requirements of the individual case. If the employee's claim "seems likely from the very beginning" or "relates only to an insignificant sum" a recommendation for payment is forwarded almost automatically to the relevant County Administration for payment.

In larger, "ordinary" bankruptcies the employee may still not have to act to protect his own interest by filing a claim, since the bankruptcy trustee is required to act for him. Immediately upon a bankruptcy the trustee is required to inform the County Administration concerning wage claims that are "clear." The employee is then informed of this protection of his interests and the County Administration proceeds with payment of the claim.

In Switzerland the employee must submit his own claim and is given 60 days from the date of formal publication of bankruptcy to submit it to the cantonal unemployment insurance fund where the debt and bankruptcy office is located. That fund will validate and pay the claim.

In the United Kingdom, as in Ireland, the trustee or receiver plays a central role. Employees make their application for payment in the Redundancy Payments Office attached to the local Department of Employment Office. The trustee, receiver or liquidator, however, is required to act as agent for the Department to process and check employees' individual claims. For some claims it appears that the trustee or other agent actually also moves beyond the legislated requirement, makes block requisitions for funds to the Department and then disburses these funds to the employees according to their respective entitlements.

The Timeliness of Payment

Since delays in payments constituted one of the major reasons why wage protection funds have been introduced, it is particularly intriguing to examine the extent to which timeliness payment is now achieved. Substantial increments of time are necessary for all parties to recognize the insolvency, for employees to file claims, adminstrators to collect those claims and trustees or other agents to confirm them, and for payments to be authorized and made. While the resulting passage of time may pale beside the delay experienced before the final wind-up of proceedings under bankruptcy legislation, the time elapsed since the employee's last receipt of a valid paycheck may still endanger his economic well-being.

Austria illustrates the most common solution, that of providing for advances on the wages for which a claim has been submitted. The Insolvency (Guarantee of Remuneration) Act provides that :

> Payments in advance
>
> In cases worthy of consideration the local employment office shall pay a claimant an advance on his insolvency compensation if there is a delay in the production of evidence and there is reason to assume that such compensation will be granted. In fixing the amount of the advance, due account shall be taken of the amount of the insolvency compensation that is expected to be payable. The advance shall be deducted from such compensation.

In Belgium a different situation prevails. There the Guarantee Fund will pay severance indemnities when the employer has not paid them within 15 days after the termination of the contract. For wage arrears and other compensation owing, however, the scheme does not count on providing payment until some four to five months after the lodging of a claim.

In Denmark, as in Austria, the fund provides explicitly for the possibilty of making a "partial payment." In practice, however, the advance is often provided by the wage earner's trade union which is then accorded the entitlement of claim on the Guarantee Fund. This is an exception to a general prohibition on the transfer of claims, the latter presumably enacted to prevent the discounted sale of claim rights.

In France, as in Belgium, the rapidity of payment varies by the type of wage claim.

The Caille Commission described the two-stage process as follows:

> The first stage will consist of the paying of super-preferred debts [60 days wage arrears, vacation pay and termination notice pay, all to daily maxima]. This payment shall be made within fifteen days commencing the date of the judgement decreeing the legal settlement or liquidation of assets: the trustee is given ten days in accordance with article 51 of the law of July 13, 1967, to draw up a statement of these debts which shall be initiated by the commissioner-judge; the institutions shall settle, within five days of the date of receipt of this statement, the sums mentioned therein.
>
> In the second stage the "other debts" resulting from the work contract shall be paid. These refer to all the debts of the salaried workers, as well as to the preferred debts as defined in article 2101 of the Civil Code, and all other "unsecured" debts.
>
> This payment is to be made within a period of three months and eight days:
>
> -- three months to enable the trustee to draw up the statement of debts;
>
> -- the payment by the managing institution should be made within eight days of the date of receipt of this statement.

In Germany the legislation provides for "reasonable" (70 percent in actual practice) advance payments but, unlike the Austrian legislation, these payments are a matter of right. The only requirements are that the employee so requests and that the office has in its possession a statement of the last settlement of wage accounts (or the employee may submit his last pay stub) and a written statement of the size of the wage entitlement owing, submitted by the employer, trustee, works council, or other authority.

For Israel the timeliness of wage protection payments is not known but presumably it is rapid. In 1958 Israel passed a Wage Protection Law to counter the previously accepted phenomenon of delayed payment of wages in continuing employment. An employer who has failed to make timely payment of wages must pay "wage delay compensation" which grows proportionately as the period of wage delay continues. A delayed wage is increased by 5 per cent for the first week it is held back and by 10 percent for each subsequent week of delay, compounded weekly on the net sum due after statutory deductions.

In the Netherlands it is reported that all necessary documents are finalized in about four weeks from the date of the termination of the employer/employee relationship or of the formal insolvency, if any.

In Sweden payment in minor bankruptcies is very timely. The District Distraint Authority(KFM) is mandated to act as quickly as possible, even at the risk of improper payment of small sums. The Swedish Insurance Fund bluntly reports that this is an acceptable cost of expediting payments of small sums if the employee's claim "seems likely." In larger "ordinary" bankruptcies timeliness of payment may be assured by the trade unions who take over the employee's guarantee right of claim.

In one particular innovative step the Swedish system also ensures perfectly timely termination notice pay. As described in the Insurance Fund Report:

> Wages while under notice are paid as they become due, on or around the regular date of payment. As a condition for the payment of such wages, the County Administration can demand that the employee make a declaration on his faith and honour concerning his employment and earned income during the period of notice.

Finally, in the United Kingdom nothing can happen until a receiver or liquidator is appointed, but thereafter wages and vacation pay are normally distributed "fairly quickly," within a month of the appointment. This speed, however, has been dependent upon the trustee, liquidator or receiver. Until recently the Act required that before disbursing funds the Secretary of State for Employment must "... receive a statement from the relevant officer of the amount of that debt which appears to have been owed to the employee." This requirement could not be dispensed with until six months after the employee's application. The resulting delays in payment were so frequent that the Employment Bill, 1982 removed the six month requirement and payments can be made whenever the Secretary of State is satisfied that there is an entitlement and that there is likelihood of delay in his receiving the relevant officer's statement.

Financing

The E. E. C. Commission Report addressed the issue of financing as follows:

> These [wage] guarantees should not lead to any additional financial burdens on the employees. The funds for this purpose should therefore be raised only from the employers' contributions. In this connection the contributions are to be calculated in such a way that the institutions will always have adequate cover in reserve. Where the

> funds to be found in the event of an employer's insolvency can be covered from an actuarial point of view from the general social security funds, to which employees contribute in addition to employers, this system could be maintained. This should not, however, result in an increase in the financial burden on the employees.

The E. E. C. Directive, however, simply stated a principle that each Member State should lay down detailed rules for financing in compliance with the principle that "employers shall contribute to financing, unless it is fully covered by the public authorities." This does not appear to exclude any assessment on employees.

In Austria the financing of the Insolvency Compensation Fund is by means of subrogated claims, fines, interest on funds held and "a supplement of the employer's share of the unemployment insurance contribution..., the rate of the supplemented being fixed each year by ordinance of the Federal Minister of Social Administration," calculated in thousandths of the payroll. No employee or state funds are used.

In Belgium, also, the Compensation Fund is exclusively funded by employers' contributions in spite of close links to the joint employer and employee funded unemployment insurance system. The method for fixing the employer contribution rate is that although the Fund's management committee propose a call rate, the final decision rests with the Minister of Employment and Labour after hearing the opinion of the (tripartite) National Labour Council. If this rate does not prove adequate the Fund has possible access to public sector borrowing. It should also be noted that in Belgium and other countries where social security benefits are guaranteed separately from wages, that is by the social security institutions themselves, those benefits are financed through the regular financial system for social security, not by contributions to the Compensation Fund or its other national equivalents. Germany is an exception to this.

In Denmark the guarantee fund is exclusively employer funded, with yearly contributions set by administrative decree as a per cent of payroll. In order to meet the initial commitments of the fund's operation, however, the legislation authorized a two year loan from the Treasury at 1 per cent interest.

In Finland claims are paid by the state which is annually reimbursed by the Federation of Unemployment Insurance Funds for the difference between disbursements and recoveries.

In France the Caille Commission recommended that the insurance plan be financed by contributions which are the exclusive responsibility of the employers. The

Commission further proposed that:

> THE CONTRIBUTION BASIS:
>
> These contributions will be based on the remunerations which are used to calculate contributions to the unemployment insurance plan...
>
> The contributions are calculated according to gross remunerations, that is, before obligatory or optional deductions have been made (Social Security contribution, employer participation in vocational training, complementary retirement plan, mutual insurance plans), including the advantages in cash, premiums and gratuities liable to income tax.
>
> In the absence of precise directives in this respect, we may think that remunerations used as a basis for the contributions are fully taken into account, with the exclusion of any ceiling as exists in the unemployment insurance plan.
>
> SETTING OF, AND RATE OF CONTRIBUTION:
>
> In the absence of any contrary directive, it will be up to the Association mentioned in article 2 to set the amount of these contributions.
>
> According to the information given your Reporter, the rate of these contributions could be assessed, in the project's balance sheet, at about 0.01 or 0.02% of the overall salaries in so far as we estimate the salary credits which have remained unpaid to the salaried workers at about 37 million F, after the closing of the liquidations of assets which occurred in 1972. Of course, the fund will need additional resources to quickly pay off the sums which it will be able to recover only after rather long periods of time.
>
> Moreover, the first year, a higher contribution could be set in order to allow the plan to benefit from reserves.
>
> Furthermore, nothing would prevent modulated contributions from being in terms of the risk to be covered, even though such a principle appears counter to the solidarity of the employer.

In practice the French levy on employers was initially set at 0.02% and started four months before the wage protection guarantee became effective. Nonetheless, funds available from the assessment quickly proved insufficient. The rate adopted was based on an estimated expenditure of 123,000 francs in 1974 whereas the actual outlay that year was 600,000 francs. Recourse was quickly made to public borrowing and the contribution rate was raised to 0.05% in July 1974 and to 0.2% in January 1975. In 1976, also, a ceiling was placed on individual claims.

By 1982 the rate had risen a further 0.05% to reach 0.25%. This compares to a general unemployment insurance contribution by employers of 2.76% and by employees of 0.84%. Both for wage protection and for general unemployment insurance these percentages are applied only on salaries up to four times the social security ceiling. That (1984) ceiling is 8110 francs and thus the ceiling used to calculate contributions is 32,440 francs ($4,550). At that rate the wage protection contribution by employers is 81 francs or $11.36 per employee.

In Germany the Bankruptcy Indemnification Fund is entirely financed by employers' contributions and the rate is fixed annually by the Federal Labour Institute on the basis of the previous year's net expenditures. When this rate is passed on to employers, however, it is done so on a variable basis. Each member association of the Federation of Employers' Mutual Insurance Associations assesses a separate experience based rate on its members. Thus, for example, in 1981 the general assessment rate was 0.0783% of gross payroll after a 1980 rate of 0.0419%. The specific assessments for quarries and concrete products employers, however, assessed by their own association, were 0.11% and 0.048% of the gross payroll. Appropriately, these assessments are collected along with workers' compensation assessments.

As in France, the wage protection guarantee was more expensive than originally envisioned. Although workers' annual losses prior to the passage of the Bankruptcy Deficiency Law were estimated at several tens of millions of marks, total payouts by the fund jumped from 71 million marks ($30 million) in 1974 to 263 million marks ($113 million) in 1975. Total payout remained at a figure of between 200 and 300 million marks through 1980, rose to 410 million marks in 1981 and rose again to 635 million marks ($272 million) in 1982. Recoveries from insolvent businesses in 1982 reduced the net cost by 80 million marks to 555 million marks ($238 million).

In Greece the jointly financed unemployment insurance scheme is administered by the National Employment and Manpower office (OAED) which budgeted 90 million drachma ($1.4 million) for the first (1982) year of operation of the wage protection guarantee.

In Ireland the new wage protection insurance is employer financed at an unknown rate and in Italy the guarantee fund for the protection of severance pay is financed from an (1982) employer paid assessment of 0.03% of annual payroll.

In Japan, wage protection financing reportedly is partly by employers, in connection with their accident insurance, and partly by the State.

In the Netherlands the wage protection guarantee is exclusively financed by employers. From 1968 - 1976 the total outlay was 190 million guilders ($70 million) of which 18% had been recovered through subrogated rights and the remainder by assessments on employers.

In Norway wage protection is also financed by employers' contributions except that an employer is allowed to pass on to his employees one half the cost of vacation and holiday pay insurance contributions.

In Spain wage protection is, again, entirely employer financed. With a contribution rate originally fixed at 0.2% of the wage used as a basis for calculating social security contributions, the scheme was underfunded (given its low recovery rate) and in 1983 the contribution rate was raised to 0.5%.

In Sweden the wage protection assessment placed exclusively on employers rose from 0.02% of the wage bill in 1971 to 0.2% in 1980. The amount paid out of the fund has varied widely but in fiscal 1978/79 was 350 million Krona ($53 million) and in fiscal 1979/80 was 270 million Krona ($41 million).

Switzerland provides a contrasting example of wage protection financing. This financing is directly out of the resources of the unemployment insurance program. In 1982 the total assessment for unemployment insurance was 0.5% of insured payroll, 0.25% paid by employers and 0.25% paid by employees.

The United Kingdom, also, provides an example of joint financing. Although originally financing was entirely by employers, effective from 1982 employees were also required to contribute, due to a substantial accummulated deficit. In 1975 flat assessment of 0.2% payroll was paid by employers (only) for redundancy payments and for unpaid wages in insolvency situations. By 1983 the total rate was 0.4% of which 0.15% was to be paid by employers and 0.25% was to be paid by employees. These rates include financing for some redundancy payments to employees of solvent firms as well as of insolvent firms.

In fiscal 1982/83 redundancy payments out of the fund reached 72 million pounds. The portion attributed to insolvencies is not recorded but has been estimated at three quarters (54 million pounds, $86 million). Other wage protection payments to employees of insolvent firms reached 46.5 million pounds ($72 million). These figures are the highest since the wage guarantee was initiated.

Priorities and Recoveries

For nations with wage protection funds the matter of priority of claim on the assets of an insolvent employer is a secondary concern. After all, the inadequacy of priority, the delay in payments on the priority and the insufficiency of assets on which the priority could be attached were basic factors leading to the introduction of wage protection funds.

Nonetheless, in all nations on which information has been obtained, that priority, or a modification of it, is now subrogated to a fund. The degree to which the fund's priority is effective, after whatever delays, is now relevant primarily as part of the long term financing of the guarantee fund (all nations direct the proceeds of the subrogated claims to their guarantee funds rather than to general revenues). The priority of the claim and the vigor with which it is pursued may differ from the situation prior to the enactment of the wage protection law. If the priority is lessened or not pursued then the claims of other creditors - primarily financial institutions, suppliers, and governments - are improved accordingly. This, in turn, should marginally improve the availability and cost of credit to firms in difficult economic straits. If the priority is maintained and vigorously pursued for the collective benefit of employers financing the wage protection fund, then the other individual creditors will receive no de facto benefit and will make their decisions on granting or extending credit accordingly.

In Austria the Bankruptcy Code and the Composition Code accord a limited preferential claim to wages, termination notice pay, severance pay and benefit contributions. This claim is effective only after claims by right of lien or other property rights. To the extent that compensation is granted to employees by the Insolvency Guarantee Fund the right of claim is subrogated to the Fund without being diminished. The rate of recoveries is not known, but prior to the creation of a fund workers received only one-fifth of their wage claims.

In Belgium, also, the Compensation Fund and the social security funds are preferential creditors, apparently after claims on movable and immovable property, tax claims and bankruptcy costs. Rights of claim are subrogated and recoveries (from all cases, not just insolvencies) amount to 10% of the Compensation Fund's annual revenue.

In Denmark and in Finland, too, claims for wages are preferential and subrogated, in Denmark to the Fund and in Finland to the State.

In France wage claims are accorded three different priorities according to the type of wage claimed, amount, and time period in which the wage was earned. The wage guarantee fund is subrogated to each of these. The highest level of claim, "super preferred," is ineffective against mortgage debts but generally receivers are bound to pay it, if funds are available, even over charges on movable and immmovable property and claims of the state.

In the first six years of operation of the guarantee fund "super preferred" subrogated claim payments were 43.5% recovered. Other preferred claims were only 12.2% recovered and ordinary unsecured claims were only 2.8% recovered.

In Germany, wage claims are accorded a preferred status, but when the guarantee fund acquires subrogated rights the claim status is reduced to rank below legal costs and wages due for the period following the date of liquidation. Nonetheless, recoveries have increased from zero in the first year of operation of the fund to 0.3% (of monies paid out the same year) in 1975, 1.4% in 1976, 3.5% in 1977, 7.8% in 1978, 14.9% in 1979, 21.8% in 1980, 11.8% in 1981, and 12.6% in 1982. Total recoveries in these years were 257 million marks ($110 million) representing 9.5% of total payments by the fund to employees.

Due to a recent, 1984, Federal Labour Court decision, however, the Federal Government has announced an intent to fundamentally reform the law on insolvency. The court decision had removed the preferential status accorded to redundancy or severance payments (which, as has been noted, are not covered by the guarantee fund), thereby making the claims practically valueless.

The new Irish Protection of Employees (Employers' Insolvency) Bill, 1984 contains provisions for apparently undiminished subrogated rights. These rights are preferential after the rights of social security and tax authorities.

In Italy employees' claims and social insurance claims enjoy special rights of preference with no limit of time or amount before charges on movable property and claims of the State, but after charges on immovable property, the costs of the bankruptcy proceedings, and the claims of industrial credit institutes in respect of tools and machinery.

In Japan civil law gives preferential priority to wage claims for the last three months, but the claim is ineffective against other claims secured by bonds and mortgages.

In Luxemburg the wage guarantee fund and the social security authorities are subrogated for employee claims and thus considered preferentially, over all other claimants, except those holding charges on movable and immovable property.

In the Netherlands the Fund's subrogated right of claim again is preferential, behind tax authorities, social security authorities and secured claims. In the first nine years of the Fund's operation the Dutch priority led to the recovery of 18 per cent of total payments by the Fund.

Norway and Spain also both subrogate the right of claim with Norway pre-empting challenges by the stipulation that the subrogation applies "even where the conditions for the payment of the guarantee are not fulfilled." In each case the claim's status is first preferred and the Spanish legislation specifies that the claim status is undiminished in spite of having been assigned. In 1981, however, Spain's rate of recovery of payments was less than 1%.

In Sweden the priority accorded wages was significantly reduced when the Wage Guarantee Fund was created and subrogated to the right of claim. Previously the priority was described (in the Swedish Insurance Fund Report) as "practically the most privileged of all claims in cases of bankruptcy," which "to a considerable extent" allowed wage and pension claims to be met from the assets of the bankrupt, if any. When the Wage Guarantee Fund was created the priority was reduced to a preferred claim, "to the benefit of those holding securities in the firm." In fiscal 1978/79 recoveries were only 24 million Krona ($3.6 million) representing 6.9% of total payments by the fund and in 1979/80 31 million Krona ($4.7 million) representing 11.5% of total payments by the fund.

In Switzerland the Unemployment Insurance Fund is subrogated to the employee's right of claim and that claim is apparently meant to be automatic. The legislation provides that the Fund "shall not be entitled to waive any claim unless the bankruptcy proceedings have been suspended by the court which declared [the] bankruptcy."

Finally, in the United Kingdom most wages, widely construed, are accorded a preferential status behind the holders of fixed charges but in front of those secured by floating charges or unsecured creditors. The Redundancy Fund may be subrogated to the wage claim, although the details and degrees of coverage differ between the wages guaranteed and those eligible for preferential status. The maximum preferential claim (in 1983) is 800 pounds plus accrued holiday pay, social security contributions and redundancy fund contributions in the previous twelve months. In 1980 - 81 these recoveries amounted to 11% of claims.

Other Cost Concerns

Other cost concerns of the various countries are of limited scope. Where problems have been experienced they appear to have arisen from lack of legislative clarity rather than from any problems endemic to wage protection funds. Even the increase in costs beyond originally expected levels has been attributed far more to the general economic situation than to the moral hazard of a fund.

In France that increase was from 0.02% in February 1974 to 0.2% in January 1975, but merely led to the placing of a cap on individual claims. Even in 1982, when the rate had reached 0.25%, it represented less than one tenth the employers' total unemployment insurance assessment. Recently announced reforms for the French unemployment insurance system, to be implemented in April 1985, have apparently left the wage protection guarantee completely untouched.

In Germany, too, the cost of the wage protection guarantee grew quickly, from an original forecast of several tens of millions of marks to over 70 million marks in the first year of operation and then, in the second year, to a plateau level of 200 million to 300 million marks, maintained throughout the remainder of the 1970's. The quickness of the increase and of subsequent levelling off, in both France and Germany, indicate that original underestimates of costs and economic downturn are more likely explanations of the cost increases than the alternative of abuse of the guarantee. It is difficult to credit the idea that desperate or unscrupulous parties could have learned so quickly and so fully how to exploit the system.

Nonetheless, German sources have provided the best commentary on the types of moral hazard associated with the wage guarantee. They reported:

> while it is true that wages are often increased prior to the date of an insolvency, such cases are investigated and there is not often reason to suspect fraudulent activity;
>
> while it is also true that employers ask employees to stay on the job for some time without wages in order to turn the business around, recognizing that the wages will be guaranteed by the Fund, in evidence this becomes a case of whether it is a misuse or a justifiable use of the legislation; and,
>
> although it is possible that fictitious companies could be started or extra employees added before an insolvency in order to create wage claims, it is difficult to do so successfully because of the registration requirements of the social security authorities.

In Sweden, as mentioned in the discussion on timeliness of payment, the Insurance Fund bluntly reports that the risk of improper payment of small sums is recognized and accepted. The reasoning set forth in the report is as follows:

> If the employee's claim seems likely from the very beginning, then no extensive investigation should be made. Nor should the KFM initiate

> any detailed investigation when the employee's claim relates only to an insignificant sum.
>
> It has been suggested in various contexts that the wage guarantee is abused, and that this is one of the reasons why payments of these sums have increased sharply in recent years.
>
> It has not, however, been proven that abuse occurs on such a scale as to influence the scale of payments to any major degree. In the view of the National Tax Office, payments have increased so sharply mainly for other reasons.
>
> It is clear, on the other hand, that unjustified claims are sometimes put forward. The KFM, in its review, has on a number of occasions brought to light attempts to abuse the system, for example by special ways of constructing the company and terms of employment.
>
> Small sums may, on occasion, be improperly paid out. This, however, has to be accepted in view of the demand for fast handling. The wage guarantee legislation is social legislation. Wage payments to employees should therefore not be unnecessarily delayed by long-drawn-out examinations on the part of the authority.
>
> When the KFM has completed its investigation - possibly with the assistance of another KFM - the authority shall inform the relevant County Administration "without delay" if a claim has been found payable.

The increase in payments, mentioned in the section on financing, was similar to the increases in France and Germany, with assessments and contributions rising quickly to several times the original levels. The "other reasons" for the sharp increase are given as the steady decline in monetary value, an increased number of bankruptcies, a higher proportion of company bankruptcies affecting a greater number of employees, an increase in the period of termination notice entitlement, and the lower priority accorded to wage claims subrogated to the Fund.

In the United Kingdom, also, payments and assessment rates increased, but far less on a proportional basis. The 1975 rate of 0.2% of payroll was set at a reasonable level and the 1983 rate of 0.4% has been attributed to the recession. The (1982) Committee on Insolvency Law and Practice (known as the Cork Committee Report after the chairman, Sir Kenneth Cork) heard evidence that some portion of this was, as in Germany, attributable to the guarantee provisions facilitating companies countinuing on business in spite of economic difficulty. The Committee heard representations that this was good, in that it allowed some companies to avoid collapse, but other representations that the law had sometimes encouraged banks as well as employees to continue to support non-viable concerns long after this was economically justified. The Committee itself divided on the issue.

Non-Fund Countries

Australia, New Zealand and the United States neither have nor are known to be contemplating creating wage guarantee systems at a national level. At the state level, also, wage protection systems have been created in only two jurisdictions - Maine and Massachusetts - and both are quite limited in regards to the wages covered.

In Australia the Bankruptcy Act provides a limited preferential claim for "salary, wages, commission or otherwise" ranking sixth in the class of preferred claims established by the Act. The uniform company legislation of the states and territories also makes preferential claims for salary or wages in the event of a winding-up. Such a priority is reported to be generally ineffective. Cases where wages have actually been collected have tended to be ones involving the Workmen's Lien Acts of the various states, although even those are often frustrated by matters of registration and timing.

In New Zealand the Insolvency Act provides for an employee right of claim for wages or salary up to a four month limit of $1,500 New Zealand dollars ($960 Canadian).

In the United States the federal Bankruptcy Code gives an unsecured, third preferred claim for "wages, salaries, or commissions, including vacation, severance and sick leave pay" earned within 90 days prior to filing or business cessation, up to $2,000, and gives a fourth, limited priority to benefit plan contributions.

The precise status of severance pay has been controversial. Some success has been achieved in classifiying it as a first preferred "administrative" expense, a status also accorded to wages earned during bankruptcy proceedings. The chances of success appear to depend upon timing and the wording of collective bargaining agreement provisions on severance pay. If the contract calls for a flat rate of severance pay, due upon discharge, the entire amount is given priority. If a variable rate is called for, then only the pro rata share earned while the debtor-in-possession administered the business is given priority. The remaining amounts fall under the third and fourth preferred categories.

The substantial litigation around the status of severance pay accentuates the lack of similarly extensive litigation or public expressions of concern about other wage entitlements. The source of this apparent anomaly perhaps may rest partly in the limits of those other entitlements. Neither U.S. federal, nor by far the large majority of U.S. state, labour laws create any statutory right to termination notice or pay-in-lieu of termination notice, to severance pay, or, in many jurisdictions, even to vacation pay. Rather, these matters are left to the individual or collectively bargained employment contract. As a result, the most common entitlement of an employee on the insolvency of his or her employer is limited to actual wage arrears, narrowly defined, possibly plus some benefit contributions to pensions or other benefit plans. Pension benefits, it should be noted, are protected in the U.S. by a guarantee system created by the Employment Retirement Income Security Act of 1974 (ERISA).

The resulting potential wage loss in an insolvency is thus small. According to one source, in the non-unionized sector of the U.S. economy that wage loss is typically no more than one pay period. If accurate, this small size assists in explaining why ad hoc practical solutions are said to provide payment of many employee wage claims in insolvency cases (other inter-related reasons stem from the nature of the U.S. credit and insolvency systems).

Such a small size of typical wage claims would also assist in explaining why the maximum claim levels allowed in U.S. state statutes are so small. Although the U.S. Fair Labour Standards Act simply provides that the priority of wage claims and the extent of such priority are regulated by the Federal Bankruptcy Act, most U.S. states have their own provisions about the priority of wage claims.

Among the 29 U.S. states which have been identified as having a priority of claim for wages, one extends it to a maximum of only $50, three to a maximum of $100, two to a maximum of $150, one to a maximum of $200, five to a maximum of $300, five to a maximum of $600, one to a maximum of $900, two to a maximum of $1,000, one to a maximum of $2,000, and one to a maximum of $3,000. For the remaining seven states the maxima, if any, are unclear or related to a number of days, weeks or months. With rare exception the status accorded to these claims is preferential.

The State of Maine's wage protection guarantee fund also covers only a small sum of wages owning, namely two weeks wages, in spite of Maine having termination notice and severance pay provisions applying to large closures. The law provides that:

> Maine Wage Assurance Fund - There is established a Maine Wage Assurance Fund to be used by the Bureau of Labor Standards within the Department of Labor for the purpose of assuring that all former employees of employers within the state receive payment for wages for a maximum of two weeks for the work they have performed. The Legislature intends that payment of earned wages from the fund be limited to those cases when the employer has terminated his business

> and there are no assets of the employer from which earned wages may be paid, or when the employer has filed under any provision of the Federal Bankruptcy Act. No officer or director in the case of a corporation, no partner in the case of a partnership and no owner in the case of a sole proprietorship may be considered an employee for purposes of this section.

The State of Massachussets also has created a limited wage protection guarantee of a quite different form. Effective January, 1985 it establishes a Re-employment Assistance Fund and a Health Insurance Benefits Fund to pay benefits in plant closure cases where advance notice of closing or severance pay is not provided. The benefits are supplemental to unemployment insurance and are designed to ensure that the worker receives 75 percent of his weekly wage, or as close to that percentage as possible within a $97 limit on the weekly supplement. The benefits are available for a maximum of 13 weeks, which is also the time period during which health insurance contributions will be made. Apart from expected adminstrative expenses, the budget set aside from the state's General Fund for these payments is $5.6 million, U.S.

Postscript

In 1985, after the text of this paper was completed, the State of Oregon enacted wage protection provisions which represent a significant departure from previous Americian practice. In general, Oregon has now enacted a modified super priority (effective in insolvencies other than bankruptcies) and an employer financed Wage Security Fund (effective in all insolvencies) to provide wage protection when there exist no other assets or resources for payment. These provisions (contained in Oregon A-Engrossed Senate Bill 193, 1985, as amended by the House) become effective July 1, 1986.

The field of application of the modified super priority extends to receiverships, sales, transfers and liquidations commenced after July 1, 1985. It includes receiverships where the receiver continues to operate a business as well as wind ups.

The priority is extended to wages and compensations for labour and services performed during the preceeding six months, to a maximum of $2,000 (U.S.) per employee. "Wages and compensation" are undefined in the Act but Oregon court decisions have interpreted wages broadly. State officials expect that vacation pay, sick leave pay and severance pay will be included.

The priority is subject to the limitation that "no claim and lien shall attach to any real property" but shall only attach to "A) Raw materials, B) Products in process, C) Cash on hand or in a bank account, D) Inventory, E) Accounts receivable, and F) Property or products of the business that are held for sale."

This modified super priority was passed by the Oregon Senate but the Oregon House supplemented it by establishing a Wage Security Fund financed by an initial assessment on employers of 0.3% of the quarterly assessable payroll, to be collected in conjunction with the regular quarterly assessment for Oregon's Unemployment Compensation Trust Fund.

The provisions for claiming from the Wage Security Fund are:

> "(1) When an employee files a wage claim pursuant to this chapter for wages earned and unpaid after July 1, 1986, and before July 1, 1989, and the commissioner determines that the employer against whom the claim was filed has ceased doing business and is without sufficient assets to pay the wage claim and the wage claim cannot otherwise be fully and promptly paid the commissioner, after determining that the claim is valid, shall pay the amount thereof to the claimant up to the amount of $2,000 or the amount of wages earned and unpaid for a period of 60 days prior to the time the employer ceased doing business, whichever amount is the lesser, from such funds as may be available pursuant to subsection (2) of section 4 of this 1985 Act.

The commissioner is then accorded rights of recovery of payment, with penalty, as follows:

> "(2) The commissioner may commence an appropriate action, suit or proceeding to recover from the employer amounts paid from the Wage Security Fund pursuant to subsection (1) of this section. In any such action, suit or proceeding, the amounts sought to be recovered by the commissioner shall be considered as secured claims against the personal property of the employer from the date of the filing required by subsection (3) of this section. In addition to costs and disbursements, the commissioner is entitled to recover reasonable attorney fees at trial and on appeal, together with a penalty of 25 percent of all was owed by the employer or $200, whichever amount is the greater. All recovery made by the commissioner pursuant to this subsection shall be paid into the Wage Security Fund.

II. WAGE PROTECTION IN OTHER CANADIAN JURISDICTIONS

A. THE FEDERAL JURISDICTION

Existing Law

The existing federal law is presented herein only for the limited purposes of providing a context for comparison to the laws of other jurisdictions and as a preface to describing attempts at reform. It is not intended as a full or detailed exposition.

The primary federal Acts of interest are the Bankruptcy Act and the Bank Act. The wage protection provisions of the existing federal Bankruptcy Act are:

> 107. (1) Subject to the rights of secured creditors, the proceeds realized from the property of a bankrupt shall be applied in priority of payment as follows:
> (a) [funeral expenses]
> (b) [costs of administration]
> (c) [Superintendent's levy]
> (d) wages, salaries, commission or compensation of any clerk, servant, travelling salesman, labourer or workman for services rendered during three months next preceding the bankruptcy to the extent of five hundred dollars in each case; together with in the case of a travelling salesman, disbursements properly incurred by him in and about the bankrupt's business, to the extent of an additional three hundred dollars in each case, during the same period; and for the purposes of this paragraph commissions payable when goods are shipped, delivered or paid for, if shipped, delivered or paid for within the three-month period, shall be deemed to have been earned therein:
> (e) [municipal taxes]
> (f) [rent arrears]
> (g) [various fees]
> (h) [workers' compensation, unemployment insurance, and Income Tax payments]
> (i) [other payments to injured employees]
> (j) [other claims of the crown]
>
> (2) Subject to the retention of such sums as may be necessary for the costs of administration or otherwise, payment in accordance with subsection (1) shall be made as soon as funds are available for the purpose.
>
> (3) A creditor whose rights are restricted by this section is entitled to rank as an unsecured creditor for any balance of claim due him.

The $500 limit was set in 1949 and at that time represented between two and three months wages. By 1984, however, average industrial wages have so risen that $500 represents only between six and seven days wages.

The value of this priority, moreover, is limited by the likelihood of collection and the delays entailed. No precise figures are available specifically for wage claimants, but the average payment for all preferred, unsecured creditors in bankruptcy files closed during 1971 was approximately 33 cents on the dollar. Since this figure included large Crown claims ranked and paid after wage claims, it may be inferred that the average payment for wage claims under s. 107(1)(d) was greater than 33 cents on the dollar.

In a 10% representative sample study for the Landry Committee (discussed below) somewhat similar results were found. For the period 1976-80, wage payments recorded by trustees were only 23% of the amounts claimed. Recorded claims were not limited to those under s. 107(1)(d) and if they had been so limited the percentage might have doubled. Conversely, trustees, to avoid wasted effort, do not record all wage entitlements when they know there will be no assets available to satisfy unpreferred, unsecured creditors so 23% thus overstates the actual payment rate of all wage entitlements.

The time delay before receiving these payments also should be noted. Although once again precise data is not available, the study carried out for the Landry Committee reported that the average time to close a bankruptcy file containing wage claims was about 14 months.

Successive Bankruptcy Bills

So far, there have been six amending bills, each of which actually would replace the entire Bankruptcy Act, distinguishable as: C-60, introduced in 1975; S-11, introduced in 1978; S-14, introduced in 1979; S-9, introduced later in 1979; C-12, introduced in 1980, and C-17, introduced in 1984.

Bill C-60 attempted to create a "super-priority" for wages widely construed to include salaries, fees, commissions and other compensation for services including severance pay, vacation pay, pension and other health and welfare plan contributions. The maximum wage claim to be accorded this status was set at $2,000 "exclusive of any amount deemed to be held in trust for Her Majesty," that is, apparently, net of withholding for taxes, etc. In addition, wages were still to be accorded a preferred status similar to that in the existing Act, for a further $2,000. gross of taxes. At that time, it should be noted, $2,000 represented 10 weeks of the average industrial wage, gross of taxes, and a progressively larger number of weeks net of taxes.

This "super-priority" was so dubbed because it went beyond the order of priority over unsecured assets and could be realized out of secured assets if funds and unencumbered assets were insufficient. Timeliness of payment was to be achieved by allowing the trustee to borrow money to pay the wage claim and subrogating the lender to the super-priority. The secured creditors would receive the wage-earner's preferred status of claim for any losses to the super-priority and would be subrogated to the wage earners right of claim against directors of a bankrupt corporation. The wording of the key provision, s. 238, was:

> (1) [definitions]
>
> (2) A claim for wages is deemed to be a claim for a secured debt that has priority over any other security interest that any creditor has in the property of a debtor.
>
> (3) Notwithstanding section 240, after a proposal or a petition is filed in respect of a debtor, a secured creditor shall not, unless he is so authorized in writing by the trustee, realize or otherwise deal with any property of the debtor in which the creditor has a security interest until ten days have elapsed following the date of the proposal or the date of bankruptcy.
>
> (4) Where there is a claim for wages against an estate the trustee may register a caveat or caution against property of the debtor that is subject to a security interest.
>
> (5) Where there is a claim for wages against an estate, the trustee may borrow money to pay the claim and may, subject to subsections (6) and (7), grant to the lender of that money a security interest in any lawful form on the property of the estate, and that security interest, irrespective of when it is registered or otherwise perfected, has priority over any other security interest to which the property of the estate is subject.
>
> (6) Where more than one property of an estate is subject to a security interest, the maximum amount of a security interest that the trustee may grant under subsection (5) in respect of each such property shall be calculated by dividing the total of the current fair values of the security interests to which each such property is subject by the total of the current fair values of the security interests to which all such properties of the estate are subject and multiplying the quotient by the total of the claims for wages.
>
> (7) Where each secured creditor agrees in writing, the trustee may, in order to secure a borrowing made under subsection (5), grant a security interest on only one or some of the properties of the estate.
>
> (8) [subrogation]

This proposal for a "super-priority" met with opposition so intense that the "super priority" was dropped from the subsequent bills S-11, S-14, S-9, and originally, C-12 and C-17. The opposition parties argued that the "super-priority" would ensure neither certainty nor timeliness of payment, would make financing more expensive and difficult to obtain, particularly for labour-intensive industries, and would create immense administrative difficulties for trustees.

These arguments were found convincing and attention was directed instead at the possibility of creating a wage guarantee fund. The prospect for creating such a fund, however, appears to have foundered over the lack of information as to what it would cost. Bankruptcy officials had estimated in 1975 that the cost would not exceed $4 million, if severance pay were to be excluded, but they also admitted that insufficient statistical information had been collected to make the estimate reliable.

Subsequent to Bill C-60, then, the approach to wage protection once again became one of simply according a preferred status to wage claims, in spite of the low levels of payment and the delays before payment. The maximum preferred claims, however, were to be raised to $2,000 for gross wages and an additional $500 for pensions, health and welfare plan contributions. In 1980 the $2,000 figure represented six to seven weeks wages (five weeks in 1984) but the wide definition of wages in bill C-60 was abandoned, making it unclear whether severance pay and termination notice pay were included.

The Senate Committee

In 1975 the primary public forum for opposition to "super-priority" had been the Senate. It was that body that had recommended, as an alternative, "a government administered fund under the authority of the Bankruptcy Act out of which unpaid wages of employees could be paid forthwith upon the bankruptcy."

In 1980 the Senate again faced the question of wage-protection, this time referred to it in the form of the $2,000 preferred status then in Bill C-12. Hearings were held by the Senate Banking, Trade and Commerce Committee on all of Bill C-12 but the issue of wage protection was reported to have "dominated the hearings before your Committee."

Three alternative solutions were suggested to remedy the problem. The first was a "super-priority" on the lines of Bill C-60. It was rejected, in detail, on the same grounds as earlier. There would be no certainty of payment where assets were insufficient and "sophisticated lenders" could avoid the super-priority. There would also be no certainty of timeliness of payment, in spite of a trustee's authority to borrow funds, since it would take time for the lender to satisfy itself as to the realizable value of any assets. The allocation of costs among secured creditors would be complex and the courts would "be clogged with cases attempting to determine the respective priorities of various classes of secured creditors and with respect to the claims of wage earners." Finally, the credit available to labour intensive industries would be impaired or reduced.

The second solution was a "modified priority" that would apply only to current assets. As such, it would not rank ahead of the claims on land and buildings, but ahead of securities on cash, temporary investments, inventory and receivables which have been created by the supply of goods and services. This "modified priority" appears to be an attempt at a compromise solution which might restore the likelihood of collection to where it had been in 1949 when lending practices in Canada were less sophisticated. Nonetheless, the Committee rejected it as suffering from the same problems as "super-priority", with the certainty of payment reduced further and the allocation of burden simplified.

The third and recommended solution was to create a Wage Earners Protection Fund. The fund would be financed by all employers with six or more employees but would cover all employees, regardless of the size of their employing firm. Administration would be through the Superintendent of Bankruptcy, with the trustees acting as agents to determine entitlements and make payments within two weeks after the date of bankruptcy. The maximum claim would be for a $2,500 total of claims for wages and pension and other benfit plan contributions. No explanation was given as to the size of this maximum claim but the Committee did explain that its recommendations of a set monetary limit rather than a time limit, expressed as a number of weeks wages, was for the purpose of benefiting the more needy low wage earners in preference to high wage earners.

The Senate Committee recommended this solution since it met all four objectives of certainty of payment, promptness of payment, simplicity of administration and lack of negative impact on business financing. Also, the Committeee referred to the wage guarantee funds in England, France and Germany as showing a fund to be the best solution for the protection of the wage earner and it referred to the experience of these countries as a guide to financing. The Committee did not, however, make any estimate of its own as to the costs in Canada.

The Landry Committee

Shortly after the release of the Senate Committee's report, the Minister of Consumer and Corporate Affairs appointed a Committee on Wage Protection in matters of Bankruptcy and Insolvency to enquire further into the question of wage protection. In particular it was asked to enquire whether wage protection should be limited to bankruptcies, to determine the extent of the problem and the costs associated with resolving it, and to advise on the possible methods of administering it.

The Committee was chaired by Raymond Landry, Dean of the Faculty of Law at the University of Ottawa and a former Superintendent of Bankruptcy. The Committee members were the Director of Research and Education for the Canadian Labour Congress, a former Deputy Chairman of the Bank of Nova Scotia, and a former Director General of the Quebec Department of Industry and Commerce.

In the year preceding its October, 1981 report the Committee surveyed the Provinces, commissioned research into the bankruptcy files and receivership summary sheets held by Consumer and Corporate Affairs Canada, and spoke with wage protection authorities of six other countries and the E.E.C.

In spite of its commissioned research the Committee was unable to determine the extent of the problem or the costs of its resolution. The Committee was, however, quite clear in echoing the Senate Committee in recommending a wage guarantee fund as the only workable means of providing wage protection.

The major value of the Landry Committee's investigations appears in their willingness to address the problem of providing wage protection in a context of overlapping federal jurisdiction over bankruptcies and provincial jurisdiction over receiverships and other insolvencies. The usual Canadian jurisdictional problem of trying to provide consistency across Canada is exacerbated by creditors in insolvencies literally being able to choose federal or provincial jurisdiction by simply putting a company into receivership or by petitioning it into bankruptcy. The Committee concluded, therefore, that any solution must be national.

The highlights and recommendations of the Committee were summarized in its report as follows:

1. The goals of a new wage protection system should be to ultimately provide total, certain and speedy recovery by employees of all unpaid employment-related claims arising in the context of bankruptcy and insolvency.

2. The means for pursuing those goals are dependent on the size of the problem and on a better co-ordination and harmonization of federal and provincial laws designed to protect wage earners claims.

3. During a three year period, it is recommended that, under federal leadership, the design of a permanent solution to the problem of unpaid wages be undertaken through the co-operative efforts of the federal and provincial levels of government.

4. A permanent wage protection system should combine preventive measures to reduce the problem (for example, better pension fund regulations) and remedial measures that draw on a separate fund to pay wage claims.

5. A permanent form of wage protection should not further alter the order of priority under the Bankruptcy Act because it would not offer the necessary guarantees of payment to employees, could affect lending practices and, contrary to a primary purpose of that Act, could unduly disrupt the orderly distribution of an insolvent employer's property.

6. The multiplicity of federal and provincial statutes should be replaced, under a permanent solution, by a comprehensive wage protection system designed to achieve the following:

   a) all employees should be covered under the new system;
   b) the total "wage package" should be protected;
   c) the new system should cover all insolvencies;
   d) the new system should assure the payment of outstanding unpaid wage claims (certainty of payment);
   e) the payment of outstanding wage claims should be promptly made;
   f) there should be consistency of application of the new system across Canada;
   g) the financing of the system should be made out of a separate pool of assets.

7. Pending the gathering of the necessary data on the extent of the problem of unpaid wages and for a maximum period of three years, an interim and partial solution should be implemented under Bill C-12, presently before Parliament, and be designed to achieve the following:

   a) employee unpaid wages, including fringe benfits, up to a maximum amount of $1,000.00, should be covered by the Federal Consolidated Revenue Fund;

   b) the Superintendent of Bankruptcy, in conjunction with private trustees and receivers, should be responsible for the administration of this interim solution;

c) in order to finance this interim solution, the priority of the Crown in right of Canada under the present Bankruptcy Act should be retained;

d) to supplement the $1,000.00 coverage and to apportion some of the cost of wage protection, the priority of employees' claims over unsecured debts, as well as the director's liability should be retained under Bill C-12.

The Re-emergence of Super-priority

Although introduced in 1980, by October, 1983, Bill C-12 had progressed no further than second reading and was being considered in the Committee. At that time, the Minister of Consumer and Corporate Affairs introduced amendments, similar to the "super-priority" provisions of Bill C-60. The main differences are, to the benefit of the wage claimant, that the ceiling is raised to $4,000 but, to the detriment of the wage claimant, that the definition of wages appears to exclude severance pay and, in whole or in part, pay-in-lieu of termination notice. Since these latter types of wages can substantially exceed other types of wage claims this is an important change, particularly for older, long service employees who may have accrued substantial severance pay entitlements.

The main text of these amendments is reproduced below:

> (1) [definitions]
>
> (2) A claim for wages is deemed to be a claim for a secured debt that has priority over any other security interest that any creditor has in the property of a debtor.
>
> (3) Where there is a claim for wages against an estate, the trustee may register a caveat or caution against property of the debtor that is subject to a security interest.
>
> (4) Where there is a claim for wages against an estate, the trustee may borrow money to pay the claim and may, subject to subsections (5) and (6), grant to the lender of that money a security interest in any lawful form on the property of the estate, and that security interest, irrespective of when it is registered or otherwise perfected, has priority over any other security interest to which the property of the estate is subject.
>
> (5) Where two or more properties of an estate are subject to security interests, the maximum amount of a security interest that the trustee may grant under subsection (4) in respect of any such property shall be calculated by dividing the total of the current fair values of the security interests to which that property is subject by the total of the current fair values of the security interests to which all such properties of the estate are subject and multiplying the quotient by the total of the claims for wages.

> (6) Where each secured creditor agrees in writing, the trustee may, in order to secure a borrowing made under subsection (4), grant a security interest on only one or some of the properties of the estate.
>
> (7) [subrogation]

When Parliament rose Bill C-12 had still not been passed and died on the Order Paper.

In 1984 the bill was reintroduced with the number C-17, absent the super-priority amendments. On May 28, 1984, however, new and more elaborate super-priority provisions were introduced. The thirty-one sections of these provisions are designed to have the same effect as the amendments to C-60 or C-12, but substantically more detail is provided. The resulting text is too long to quote, but on introduction the Minister described the intent as follows (emphasis in the original):

> Once the super-priority is part of our insolvency statute, I foresee that in most cases where there is only one secured creditor with a security interest in all or most of all the assets of an employer, the payment of wages will quickly and simply be done.
>
> The statute must, however, provide for situations where there will be more than one secured creditor affected or where the secured creditor will not willingly advance the funds for the payment of wages.
>
> The statute cannot simply state that wage-earners have a super-priority claim over all assets of their employer. It must say who does what and when to make that super-priority right an effective one.
>
> There would be four phases in the super-priority:
>
> 1) ascertaining the wages to be paid;
> 2) getting the funds to pay these wages;
> 3) paying the wages; and
> 4) apportioning the burden of the super-priority between secured creditors where there is more than one secured creditor.
>
> Put simply, the Act would force the trustee to pay the wages within 15 days of the bankruptcy or the receivership. The trustee would establish what is owed to each employee; there would be no need for employees to file a claim. They could, of course, dispute the accuracy of the trustee's determination of what he is owed.
>
> To get the funds required to pay the wages, the trustee would first have to use the unencumbered assests of the estates. If that is insufficient, he would then borrow on the strength of the encumbered assets. He could select to borrow on only one of many encumbered assets. As a counterpart to him getting a loan, the trustee would grant the lender a first-rank security interest on the already encumbered assets.

> The trustee would then proceed to pay the wages.
>
> Then comes the important and complicated question of apportioning the burden of the super-priority between two or more secured creditors: as soon as possible, the trustee would prorate the share of the burden that is to be affecting each encumbered asset.
>
> Once that determination is made, the trustee would then have to compensate the secured creditor whose asset was used to borrow; the trustee would get the other secured creditors to pay their own share of the burden.
>
> Finally, if and when the trustee later gets funds into the estate, before paying out any dividend he will first use these funds to reimburse the secured creditors who will have seen their security interest reduced by the payment of the super-priority,

B. OTHER PROVINCIAL JURISDICTIONS

Manitoba

Manitoba has been one of the more active provincial jurisdictions in attempting to ensure wage protection. In the mid 1970's it went so far as to legislate a priority over holders of pre-existing securities. This was as close to the federal "super-priority" as a Province could come and by 1978 it had been sufficiently developed to be regarded as effective. Although that view was not judicially confirmed, in Manitoba it was so widely held that substantial pressure developed from the financial and business communities. As a result, the relevant provisions of the Payment of Wages Act were amended to exempt real property mortgages and purchase money security interests.

The unrevised provision was that:

> 7. (1) Notwithstanding any other Act, the amount of wages due and payable by an employer to an employee not exceeding $2,000.00 constitutes a lien and charge on the property and assets of the employer in favour of the employee, and is payable in priority to any other claim or right, including those of the Crown in right of Manitoba, and without limiting the generality of the foregoing that priority extends over every assignment, including an assignment of book debts, whether absolute or otherwise, every mortgage on real or personal property, debenture and security, whether registered or not, made, given, accepted or issued before or after the coming into force of this Act.

The revised provisions are that:

> 7 (1) Notwithstanding any other Act, but subject to subsection (6) and

> (7) the amount of wages due and payable by an employer to an employee not exceeding $2,000.00, constitutes a lien and charge on the property and assets of the employer in favour of the employee and is payable in priority to any other claim or right, including those of the Crown in right of Manitoba, and without limiting the generality of the foregoing that priority extends over every encumbrance, assignment, including an assignment of book debts, whether absolute or otherwise, debenture and other security, whether registered or not, made, given, accepted or issued before or after the coming into force of this Act.

and,

> 7 (6) notwithstanding the provisions of subsection (1) or of any other Act of the Legislature whether of special or general application, any mortgage registered in a land titles office prior to
>
> a) the filing of a certificate of judgement pursuant to subsection (4); or
>
> b) the filing of a caveat pursuant to subsection (5); has priority to the lien for wages except for advances made on account of the mortgage after the certificate of judgement or caveat was filed in the land titles office.
>
> 7 (7) Notwithstanding the provisions of subsection (1) or of any other Act of the Legislature, a perfected purchase money security interest has priority to any lien for wages if the purchase money security interest was perfected.
>
> a) prior to filing of a financial statement under subsection (5) by the director; or
>
> b) at the time the debtor obtained possession of the collateral or within 10 days thereafter.

After these 1980 revisions, however, the priority accorded wage claims was once again deemed insufficient and in March, 1981, the Provincial Government announced that effective April 1, 1981, a regulation would be issued under the authority of a previously unused section of the Act. That section read:

> Section 19. The Lieutenant Governor in Council may establish a fund to be called the "Payment of Wages Fund" with monies advanced to the fund from and out of the Consolidated Fund as authorized by an Act of the Legislature to be paid and applied for the payment of wages in accordance with the provisions of the regulations.

The regulation giving effect to the section provided that:

> 1. [definitions]
>
> 2. Subject to section 3, where an order for the payment of wages has been made pursuant to sub-section 8(3) or sub-section 15(2) of the

Act, and at least 30 days have elapsed since the making of the order, the director, where he is statisfied that

(a) all reasonable and necessary efforts have been made to collect the unpaid wages: and
(b) all appropriate procedures under the Act for the collection of unpaid wages have been utilized; and
(c) the wages or part thereof ordered to be paid remain unpaid

the Minister of Finance, on the requisition of the director, shall pay to employee out of the fund the unpaid wages or part thereof, and shall deduct therefrom and remit to the appropriate authorities all deductions authorized by law.

3. In any calendar year the amount paid to an employee from and out of the fund in respect of unpaid wages shall not exceed in the aggregate $1,2000.00, notwithstanding the number of claims that the employee may have in that calendar year.

4. Where pursuant to this regulation, the Minister of Finance has paid to an employee any amount in respect of unpaid wages, the director is thereupon vested with all the rights of the employee to take such action or institute any proceedings against the employer in law to recover the amount of unpaid wages so paid to the employee.

5. Where the Minster of Finance has paid any amount out of the fund in respect of unpaid wages and thereafter the director recovers the unpaid wages or any part thereof from the employer, the director shall deposit in the fund any amount of unpaid wages so recovered not exceeding the amount paid to the employee pursuant to section 2; and any amount recovered in excess of that amount shall be remitted to the employee.

6. Where the director has made an order for the payment of unpaid wages pursuant to sub-section 8(3) of the Act and no person or employee has pursuant to sub-section 8(5) of the Act requested the director to refer the matter to the board, the director may, at any time and on his own initiative, refer the matter to the board for a determination.

The most notable feature of this regulation is that it is not limited to cases involving the bankruptcy or insolvency of the employer but applies as well to other cases.

A second notable feature is that the Payment of Wages Fund is financed exclusively out of general tax revenues and recoveries from the subrogated rights of claim. At the time of announcing the Regulation the Minister of Labour said that employer assessments were rejected as too expensive to collect. The possibility of combining assessments with those of the Workers' Compensation Board was rejected as requiring a change in legislation, recruitment of additional staff and enlarging the number of employers from which the Board must collect assessments.

A third point of interest is the $1,200 limit on an individual's claims in any calendar year. The Minister commented that the original intent was to make the protection open-ended, but an advisory committee advocated a limit to curb possible abuse. In particular such abuse was identified as possible arrangements between insolvent employers and their employees, premised on the knowledge that the fund would pay the wages. The $1,200 figure was settled upon as roughly double the average amount of wages thought to have been lost by employees in business closures in the previous three years.

As another way of imposing a limit, Manitoba chose to explicity exclude from coverage any claims for pay-in-lieu of termination notice. Manitoba does not have any legislated requirement for severance pay, but where employees have a contractual right to severance pay it, too, is excluded from coverage by the Fund.

Surprisingly, the Manitoba Regulation also does not ensure timeliness of payment. It does not provide for payment until perhaps two or more months have elapsed. Such delay results from the cumulative passage of time required for employees to file claims, the Director of Employment Standards to investigate and determine entitlement, the order-to-pay to be issued, the 30 day waiting period to expire, recourse to be made to the Fund and payment to be made by the Minister of Finance.

The original projection of net costs of payments from the Fund was projected at $150,000. That sum was set on the basis of previous estimated average annual wage losses of $114,000,and payments from April 1, 1981, to October 31, 1981, were only $50,000. In practice, however, these costs have grown. For the next year, November 1, 1981, to October 31, 1982, the rounded breakdown is:

	paid	recovered	net cost
Bankruptcies	171,000	6,000	165,000
Receiverships	124,000	12,000	112,000
Other Insolvencies	72,000	1,000	71,000
Non-Insolvencies	21,000	1,000	20,000
TOTAL	$388,000	$20,000	$368,000

For the following year, November 1, 1982, to October 31, 1983, the breakdown is:

	paid	recovered	net cost
Bankruptcies	171,000	30,000	141,000
Receiverships	159,000	36,000	123,000
Other Involvencies	90,000	10,000	80,000

Non-Insolvencies	19,000	10,000	9,000
Total	$438,000*	$85,000*	$353,000

For the most recent year, November 1, 1983, to October 31, 1984, the breakdown is:

	paid	recovered	net cost
Bankruptcies	115,000	58,000	57,000
Receiverships	149,000	23,000	126,000
Other Insolvencies	98,000	12,000	86,000
Non-Insolvencies	20,000	7,000	13,000
Total	$381,000*	$99,000*	$282,000

* (note: totals vary due to rounding)

For the 1982-83 year, 1061 employees of 127 employers benefited, all of whom were involved in insolvencies except 38 employees of 19 employers. The average paid to employees by the Fund was slightly over $400 or somewhat over one week's wages. The average sum recovered was under 20% of payments. For 1983-84 these figures changed to 837 employees of 132 firms, including 36 employees of 19 firms not insolvent, an average payout of $460 and a 26% recovery rate.

Perhaps as a result of the net annual costs, in April, 1983 the Government moved to restore the priority of claim over real property mortgages and purchase money security interests that had been removed in 1980. Presumably, the Government would be the primary benficiary of this priority, through the subrogated rights of workers paid by the Fund.

This bill was not, however, enacted. Instead, an Advisory Committee was formed to recommend alternatives to the Minister, such as the possiblity of financing the Fund through a levy on employers. This Advisory Committee has now made its report but the contents of that report have not yet been made public.

Quebec

Quebec has legislated an inoperative authority for a general wage protection fund and it has an operative wage protection fund limited to the construction industry.

Quebec's legislation on a general wage protection fund was passed in 1979 as part of its new Labour Standards Act. It was to be financed by an extension of an employers' levy already extant to cover other costs of administration of Labour Standards. The levy was not to exceed 1% of the employer's wage bill.

The Labour Standards Commission was authorized to pay employees' wage claims directly in two situations. First, if the Commission had ordered an employer to pay and that order had been outstanding for 20 days, then the Commission itself might pay the claim up to a ceiling of the minimum wage. Second, where the employer was insolvent the Commission could pay employees' wage claims apparently without applying the minimum wage as a ceiling. The relevant provisions are:

> 29. The Commission may, by regulation,
>
> ...
>
> (4) determine the nature of the claim that gives entitlement to the benefits it may pay to an employee following the bankruptcy of an employer, the conditions of eligibility for such benefits, the amount of such benefits and the terms and conditions of payment of such benefits to the employee;
>
> (5) levy, upon employers, an amount not exceeding one per cent of their total wage bill, fix the maximum wage bill that makes an employer subject to the levy; this regulation must fix the method and rate of the levy and the period for which it is exigible, and be accompanied with an estimated statement of receipts and expenditures of the Commission;
>
> (6) determine the nature of the claims that give entitlement to the payments it is authorized to make under section 112, the conditions of eligibility for these payments, the amount of these payments and the terms and conditions of payment of such amounts to the employee.
>
> 39. The Commission may
>
> ...
>
> (6) pay the amounts it considers to be due by an employer to an employee under this act or a regulation up to the minimum wage, taking into account, where such is the case, the increases provided for therein:
>
> (7) pay to an employee, following the bankruptcy of his employer, the benefits contemplated in paragraph 4 of section 29,
>
> (8) institute in its own name and on behalf of an employee, where such is the case, proceedings to recover amounts due by the employer under this act or a regulation, notwithstanding any act to the contrary, any opposition or any express or implied waiver by the employee and without having to justify an assignment of debt of the employee;
>
> (9) intervene in its own name and on behalf of an employee, where such is the case, in proceedings relating to the insolvency of the employer; ...
>
> 111. Where, following an inquiry, the Commission considers that an amount of money is due to an employee in accordance with this act or the regulations, it shall put the employer in default to pay such amount to the Commission within twenty days of the mailing of such putting in

> default by registered mail.
>
> The Commission shall at the same time send a copy of such putting in default to the employee.
>
> 112. If the employer fails to pay such amount within the time fixed in section 111, the Commission may, of its own authority in the cases provided by regulation made under paragraph 6 of section 29, pay the amount to the employee to the extent provided for in paragraph 6 of section 39.
>
> The Commission is thereupon substituted in all the rights of the employment up to the amount thus paid.
>
> 136. The Commission may, out of its funds and in the manner provided for by a regulation made under paragraph 4 of section 29, compensate an employee for the whole or part of the loss of wages or of any other pecuniary benefit accruing to him under this act or a regulation, where he has incurred such loss on account of the bankruptcy of his employer.
>
> 137. For the application of this chapter, an employer is bankrupt where a receiving order is made against him under the Bankruptcy Act..., where he makes an assignment of his property within the meaning of that Act and, if it is a corporation, where a winding-up order is made against it under the Act respecting the winding-up of insolvent companies..., for insolvency within the meaning of the said Act.
>
> 138. The Commission, where compensating an employee in the event of a bankruptcy, is subrogated in all his rights up to the amount so paid.

The only known reasons for these provisions being passed but not proclaimed are the familiar ones of concern over cost, potential abuse and what claim ceilings would be both fair and practical.

Part of the concern over costs may have arisen from the example of the construction industry fund. The Construction Industry Decree Act provides that:

> Special compensation fund
>
> Sec. 31. 31.01 Make-up of the fund: The employer must send to the Board, together with this monthly report, the sum of $0.01 for each hour worked by each of his employees for the months preceding his report. The sum thus collected constitutes a special compensation fund for which the Board acts as trustee and which it must administer solely according to the provisions set up by the Joint Committee of the Construction Industry. This special compensation fund must be used to pay employees for salary losses incurred with the limits provided for in this Division. As of 1 June 1982, the amount is raised to $0.02 for each hour worked.
>
> For the sole purposes of this Division, the word "wage" means payment in cash, vacation compensation, the employer's contribution to the construction industry's fringe benefit program as well as travelling expenses.

For the sole purposes of the application of paragraph "a" of section 31.02, the fund, besides compensating the employee for the loss of his wage, pays to the concerned union or syndicate union dues for the compensated period.

31.02 Compensation: Wage losses covered by the fund are the following:

(a) losses incurred by bankruptcy, writ of sequestration, transfer of property, bankruptcy, voluntary bailment or liquidation of a company for insolvency;
(b) losses incurred by the enforcement of section 27.04 [jury duty]
(c) losses incurred by the issuing of cheques without cover by the employer, as well as those incurred by the non-payment of wages by an employer who terminates his operation in the construction industry, up to 4 weeks of pay;
(d) also, within the limits of paragraphs a and c, the compensations ordered by a ratified arbitration decision and based upon the wages lost by the employee or ordered by a judgment delivered following such arbitration decision for the said liquidation.

For the five year period from 1978 to 1982 the experience of this fund was:

Year	Claims	Payments
1978	1,837	$1,130,000
1979	3,330	$2,210,000
1980	2,191	$1,680,000
1981	2,419	$2,122,000
1982	2,086	$2,343,000

Thus, for these five years there were almost 12,000 claims which averaged $800 each. The assessment on employers was therefore raised from one cent to two cents per hour worked by each employee. The size of recoveries from subrogated claims has not been ascertained.

New Brunswick:

New Brunswick provides another example of wage protection funds in legislation but not in operation.

In July, 1982 the Vacation Pay Act was amended to cover vacation pay claims starting with the vacation pay year ending June 30, 1982. Coverage was not limited to bankruptcies and insolvencies, but it was also not automatic; it enabled rather than required payment. That payment was to be made from general revenues rather than from a levy on employers. The key provision was:

> 6(1) Upon the application of an employee entitled to vacation pay or pay in lieu of vacation under this Act, the Minister may, where
>
> (a) he is satisfied that all reasonable efforts have been made to obtain payment from the employer, and money remains owing, or
>
> (b) an order has been made by a judge under subsection 5(2), and the money has not been paid pursuant to the order, pay to the employee from funds appropriated for the purpose an amount equal to the amount to which the employee is entitled.

The expense of these payments was much greater than anticipated. In nine months (but covering vacation pay accrued up to a year earlier) $350,000 was paid out and only a negligible amount recovered from employers. Another $50,000 in claims was received during that nine months but no funds were allocated and none have since been allocated.

The unexpected size of claims for vacation pay has been attributed to three factors. The first and primary factor was the recession. A second, interrelated factor was the impact of two exceptionally large plant closures. A third factor is attributed to the "moral hazard" to which employers are exposed in deciding which creditors they will try to pay before going into bankruptcy, receivership or other form of insolvency: after July 1, 1982 employers may have been less likely to pay vacation pay than previously, and more likely to use available funds to satisfy other small creditors. The number of vacation pay claims may have risen accordingly.

At the same time that New Brunswick passed legislation to protect vacation pay it also passed a new Employment Standards Act. If proclaimed, that Act would have extended the Minister's authority from only a vacation pay guarantee to also cover wages and pay-in-lieu of termination notice (a statutory entitlement of up to four weeks). The conditions of payment are identical to those in section 6 of the Vacation Pay Act.

Although as yet unproclaimed, there is no clear indication that New Brunswick intends to abandon or to modify its wage guarantee provisions. In mid-1984 the unproclaimed Act was amended extensively in regard to substance as well as to language, yet the section on wage protection was left untouched.

The Pursuit of Priority

The remaining Provinces have not created wage insurance funds. Rather, they have legislated, or attempted to legislate, security interests or statutory preferences for wages. The success of such efforts has varied between jurisdictions and over time.

The classic example is, perhaps, British Columbia. In 1970, British Columbia legislated a priority over secured creditors, made through the device of a lien and charge. Since then this priority has been repeatedly litigated and renovated and often avoided. The high point may have been 1975 when British Columbia reportedly collected 88% of the monies it sought on behalf of workers in insolvencies (albeit with lesser termination notice entitlements than Ontario and no equivalent of Ontario severance pay requirements). Court decisions, however, resulted in an extensive change in the pattern of insolvencies, with almost all receiverships with wage claims being converted into bankruptcies. Also, pre-registered real property was exempted from the priority, even in receiverships. Recoveries in bankruptcies are now perhaps only 10% and are far less than in 1975. In 1983, B.C. estimated a shortfall in recoveries of $6 million.

The relevant section of the Employment Standards Act now reads:

> Lien and Charge on Property
>
> Sec. 15.(1) Notwithstanding any other Act, unpaid wages constitute a lien, charge and secured debt in favour of the director, dating from the time that the wages were earned, against all the real and personal property of the obligor, including monies due or accruing due to the obligor from any source
>
> (1.1) Unpaid wages set out in an order or decision filed by the Labour Relations Board pursuant to section 30 of the Labour Code; constitute a lien, charge and secured debt in favour of the persons named in the order or decision against all the real and personal property of the employer or other person named in the order.
>
> (2) Notwithstanding any other Act, the amount of a lien and charge and secured debt referred to in subsections (1) and (1.1) is payable and enforceable in priority over all liens, judgements, charges or any other claims or rights including those of the Crown in right of the province and without limiting the generality of the foregoing, the amount has priority over
>
> (a) an assignment, including an assignment of book debts, whether absolute or otherwise and whether crystallized or not,

> (b) a mortgage of personal property,
> (c) a debenture charging personal property, whether crystallized or not, and
> (d) a contract, account receivable, insurance claim or proceeds of a sale of goods,
>
> whether made or created before or after the date the wages were earned or the date a payment for the benefit of an employee became due.
>
> (3) Notwithstanding subsection (2), the lien, charge and secured debt referred to in subsection (1) and (1.1) does not have priority over a mortgage of, or debenture charging, land, that was registered in a land title office before registration against the property of a certificate of judgement obtained pursuant to the filing under section 14, except with respect to money advanced under the mortgage or debenture after the certificate of judgement was registered.

The wording of statutes differs in the other provinces but the reality of low collections reportedly does not. Alberta's legislation creates a secured claim effective only from the date of registration of an order. Saskatchewan's legislation creates a deemed trust through a lien along with a secured status priority except against prior mortgages on real property and prior registered personal property security interests. Nova Scotia's legislation characterizes wages and vacation pay as a mortgage payable over all other secured claims including security interests on land. Once again, however, court decisions have rendered this ineffective as soon as the employer is placed in bankruptcy. Nova Scotia's legislative provision reads that:

> Lien
>
> Sec. 84(1) Notwithstanding any other Act, an order of the tribunal under section 24 constitutes a lien and charge in favour of the tribunal for the amount set forth in the order and the amount set forth in the order is a debt due or accruing due to the Tribunal by the employer and the Tribunal shall be deemed to hold a mortgage on the assets of the employer to the amount set forth in the order and may enforce the mortgage by foreclosure proceedings.
>
> Priority of Lien
>
> (2) The lien and charge and mortgage referred to in subsection (1) shall be payable in priority over all liens, charges or mortgages of every person in respect of the real and personal property of the employer, including those of the Crown in the right of the Province, but excepting liens for wages due to workmen by the employer.

Prince Edward Island's Labour Act creates a first, preferred claim for $2,000 behind secured creditors but ahead of all other preferred, ordinary or general creditors. Newfoundland's Labour Standards Act creates a claim over "all" creditors for $2,000 that in practice is similar to that of Prince Edward Island.

Guarantee Bonds

Apart from both the pursuit of priority and the creation of wage insurance funds a third option is frequently suggested: requiriing cash security or guarantee bonding for expected liabilities. This approach is found in Alberta's Industrial Wages Security Act, Manitoba's Payment of Wages Act and in various statutes pertaining to government contracts.

Alberta's Act provides, in part, that:

Sec. 3.

> (1) An employer who is engaged in a designated industry shall lodge with the Minister, prior to the date of commencement of operations in any year, security for the payment of wages to workmen employed by him during the period of 12 months from the date of commencement of operations in each designated industry in which he is engaged.
>
> (2) The amount of the security shall be as follows:
>
> (a) in case the period during which the wages have been paid or payable to workmen employed by him in any designated industry immediately preceding the date of commencement of operations is less than a full period of twelve months, such amount as the Minister in his discretion may determine.
>
> (b) in any case where an employer has been ordered under section 10 to cease the operation of the industry for having defaulted in the payment of any wages payable to any workman employed by the employer in the industry, an amount equal to twice the greatest amount paid by him for wages in that industry in one month during the period of 12 months immediately preceding the said date of commencement of the year's operations;
>
> (c) in all other cases, an amount equal to the greatest amount paid by him for wages in any designated industry in one month during the period of 12 months immediately preceding the said date of commencement of operations.

and,

Sect. 5.

(1) The security shall consist of cash or a guarantee bond of a bonding company authorized to carry on business in Alberta, or some other security or securities approved by the Minister.

and,

Sec. 14

Any sum in the hands of the Minister by way of security or on account of any security held by him under this Act shall be available for the payment of all the wages for the securing payment whereof the security was given and shall be distributed ratably.

Manitoba's more general provisions simply state that:

Sect. 12.

(1) The minister may, where he deems it advisable, require an employer to furnish to him, security in the form of a bond with one or more sureties in such amount and subject to such conditions as may be prescribed in the regulations.

(2) Where, in accordance with the provisions of this Act, it is found that an employer who has furnished a bond under subsection (1) is indebted to any of his employees, the minister may apply the proceeds of the bond towards the payment, pro tanto, of the unpaid wages of the employees and shall notify the employer accordingly.

Security bonding has a lengthy history in Alberta (Alberta's Act can be traced to 1943 and predecessor Acts to 1938) but its scope of application has been narrow (e.g. in Alberta the only industries covered are lumbering and coal mining). Why has it not been applied more widely in Alberta or in other Provinces? Indeed, why have Manitoba opted for a wage insurance fund in preference to security bonding (section 12 of the Payment of Wages Act is ineffective since no regulations have been issued)?

The answers to these questions stem directly from the disadvantages entailed in practical implementation of security posting or bonding.

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APPENDIX III

PRESENT WAGE PROTECTION IN ONTARIO

MAUREEN KENNY

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PRESENT WAGE PROTECTION IN ONTARIO

Employees of insolvent employers may have their employment terminated by their employer, by a receiver or trustee, or by operation of law. On the other hand, their employment may be continued by a receiver or trustee, or they may, by law, be entitled to be hired by a successor employer. The wages or payments owing to them, as well as the prospect of actually recovering the wages or payments owing, will depend on a number of factors, many of which are beyond the control of the employees. Wage recovery may, for example, depend on whether the employees are laid-off or terminated prior to the employer's bankruptcy or at the date of bankruptcy; whether a receiver is court appointed or privately appointed; whether the employer's business is subject to receivership or to proceedings in bankruptcy; whether the employees are covered by a collective agreement or whether the employer's business ceases or is sold as a business.

Existing legislation provides a plethora of possible wage claims and recovery mechanisms for those claims. However, many of these mechanisms are ineffective because the wage claim is an unsecured or at most, a preferred claim and paid only after secured creditors have realized on their security.

Hourly wages or salary owing to non-construction employees of an insolvent company will not have priority over the claims of secured creditors. Although claims for hourly wages or salary are sometimes paid by receivers, (particularly if the receiver needs the co-operation of the employees to continue the business), employees usually will only be paid wages or salary owing if sufficient assets remain after secured creditors realize on their security. Even then, such claims have priority over unsecured creditors and most preferred creditors only to a maximum of $500 in a bankruptcy or $2000 in a receivership situation. Recovery for these claims is therefore often low or non-existent.

Vacation pay, contributions to pension plans which have accrued or which are due, employee contributions to C.P.P. and U.I. which have been deducted from wages, and wages for certain construction workers are usually paid in priority to the claims of the secured creditors. These claims are either protected by a statutory trust (which 'deems' money to have been kept separate and apart from the employer's assets) or protected by a statutory lien. However, these claims may rank after certain prior secured claims.

Major claims - for termination pay, severance pay and income tax deductions will usually only be paid if sufficient assets remain after secured creditors (and, in many cases, preferred creditors) realize on their security. In a bankruptcy, the priority for these claims will be lower than the priority for hourly wages and salary. Recovery for these claims is therefore often low or non-existent (although changes proposed in the 1985 federal Budget will, if they become law, protect income tax deducted from an employee's wages after May 23, 1985).

Employees of a business which is sold who are covered by a collective agreement, may be able to recover some wages owing to them from the successor employer.

Although there are a number of possible legal proceedings which could be taken against officers, directors or agents of the insolvent employer, rarely are such proceedings pursued by either the government or the individual employees affected.

The individual employees or, in the case of taxes or contributions to government plans, the members of the plans or the taxpayer (through direct government contributions or write-offs of moneys owing) usually absorb the cost of ineffective wage recovery mechanisms.

The following discussion is concerned with private sector employees employed by enterprises within provincial jurisdiction. It does not deal with public sector employees or employees employed by enterprises within federal jurisdiction. Also, because of this Commission's terms of reference, this discussion focuses on wage protection for employees in the event of the insolvency of an employer.

This paper will examine the types of wages or other payments which an insolvent employer may owe his or her employees. It will also deal with the wage protection provided for such wages and payments by provincial and federal legislation. In addition, the efficacy of such legislative protection will be examined.

TYPES OF WAGES OR OTHER PAYMENTS OWED BY AN INSOLVENT EMPLOYER

Employees may be owed various types of wages because an insolvent employer has stopped paying employees and gone out of business. Alternatively, the employer may make a voluntary assignment in bankruptcy or certain of the employer's creditors may put the employer into receivership or bankruptcy.

In addition to his or her wages or salary, an employee may be owed pay in lieu of notice (termination pay), severance pay, vacation pay or other amounts payable under the terms of a contract or collective agreement. Payments for the employee's fringe benefits may also be owing (e.g. payments to a private pension fund, an income replacement plan, or dental plans, death or disability insurance plans). Employer contributions to the Canada Pension Plan (C.P.P.) and the Unemployment Insurance Commission (U.I.C.) and Worker's Compensation Board (W.C.B.) assessments may not have been made. In addition, an employee's income tax, C.P.P., or U.I.C. payments may not have been made on his behalf by the employer, although deducted at source from the employee's wages.

A number of proceedings may be taken to recover hourly wages or salary (see Appendix A). This paper will deal with the more commonly used wage protection provisions in legislation such as the Employment Standards Act, the Bankruptcy Act, the Labour Relations Act, the Construction Lien Act, and the Pension Benefits Act and in legislation dealing with income tax deductions and contributions to government plans.

This paper will examine the efficacy of these provisions in recovering the following types of wages or other payments which might be owing by the insolvent employer:

A) Hourly Wages or Salary

B) Pay in Lieu of Notice (Wrongful Dismissal Damages or E.S.A. Termination Pay).

C) Severance Pay

D) Vacation Pay

E) Pension Benefits and Contributions

F) Contributions to Government Plans such as

  i) Workers' Compensation
  ii) Ontario Health Insurance Plan
  iii) Canada Pension Plan
  iv) Unemployment Insurance
  v) Income Tax

G) Other Benefits

A) HOURLY WAGES OR SALARY

Wages or salary may be owing by a bankrupt or insolvent employer to an employee pursuant to an individual contract of employment or pursuant to a collective agreement.

The Employment Standards Act R.S.O. 1980, c. 137 (the "E.S.A.") covers most employees and requires an employer to pay the higher of the minimum wage or the wage specified in the contract of employment (E.S.A. s. 4,7). Overtime must also be paid for hours worked in excess of 44 in any week (E.S.A. s. 25) and certain employees are entitled to pay on public holidays (E.S.A. s. 26-28). The following considers the priority provisions and enforcement mechanisms in the E.S.A., the Bankruptcy Act, and the Labour Relations Act with respect to moneys which might be owing for regular wages, overtime, and holiday pay.

E.S.A. Priority

Section 14 of the E.S.A. provides:

> "Notwithstanding the provisions of any other Act and except upon a distribution made by a trustee under the Bankruptcy Act (Canada), wages shall have priority to the claims or rights and be paid in priority to the claims or rights, including the

> claims or rights of the Crown, of all preferred, ordinary or general creditors of the employer to the extent of $2,000 for each employee."

Thus, except upon a distribution under the Bankruptcy Act, employees' wages rank after secured creditors and before preferred and ordinary creditors to the extent of $2,000. The employees are ordinary creditors for the amount owing in excess of $2,000.

Any monetary remuneration payable by an employer to an employee under the terms of a contract of employment, or any payment to be made by an employer to an employee under the E.S.A. is "wages" for the purposes of the E.S.A. Thus, the E.S.A priority applies to hourly wages or salary, overtime pay and public holiday pay. Employer contributions made to plans or funds such as pension plans, income replacement plans, funds providing unemployment benefits or any other plans providing benefits for death, disability, sickness, medical or dental expenses or benefits under a deferred profit sharing plan are not "wages" (E.S.A. s. 1(p), 34).

Effectiveness of the E.S.A. Priority Provision

The priority for wages to the extent of $2,000 for each employee created by E.S.A. s.14 is generally ineffective because it does not apply if the employer is bankrupt, and because employees' wages do not have priority over secured creditors (Campeau Corporation v. Provincial Bank of Canada (1975), 20 C.B.R. (N.S.) 99, 7 0.R. (2d) 73 (Ont. Div. Ct.)). Therefore, employees' wages will only be protected (and then only to $2,000) if there is no bankruptcy and there is sufficient property not subject to security.

E.S.A. Enforcement

E.S.A. procedures can be used to collect wages and salary, overtime and public holiday pay.

If moneys are owing, the E.S.A. provides that the Director may:

1. issue a letter of garnishee to any person the Director believes is about to become indebted or liable to make any payment to the employer (E.S.A. s.52(1));

2. once an order is issued by an employment standards officer under s. 47 or an order is given by a referee who is appointed under s.50 or in most cases under s.51, issue a certificate and file the certificate with a civil court so that it is enforceable as a judgment or order of the court (E.S.A. s.54);

3. prosecute the employer (E.S.A. s. 59); or

4. prosecute any officer, director or agent of the corporation who authorized, permitted or acquiesced in the non-payment of wages if the employer is a corporation (E.S.A. s. 60). No prosecution can be instituted without the consent of the Director of Employment Standards.

If the Director successfully prosecutes the employer or an officer, director or agent of a corporate employer, the provincial offences court can order the employer or the officer, director or agent to pay the unpaid wages to the Director for distribution to the employees (E.S.A. s.59(2), 60(3)).

Effectiveness of the E.S.A. Enforcement Provisions

Although letters of garnishee, orders to pay and court judgments or orders are useful enforcement mechanisms to recover wages and salary prior to the insolvency of the employer, such mechanisms are generally ineffective after the employer is insolvent. No greater priority is created than is created by the section 14 priority discussed above.

Prosecution of the employer is also unlikely to be effective in recovering wages if the employer is insolvent. If the officers, directors or agents of a corporate employer are solvent, prosecution and orders for these individuals to pay unpaid wages could be effective in recovering wages. However, prosecutions under this section are uncommon because the prosecution must prove that the officer, director or agent authorized, permitted or acquiesced in the non-payment of wages (E.S.A., s.60). Although the onus is on the agent, director or officer to prove that he or she did not authorize, permit, or acquiesce in the contravention of the Act, it may be difficult to obtain a conviction under this section.

Bankruptcy Act Distribution

An insolvent employer may make a voluntary assignment in bankruptcy or a creditor may petition the insolvent employer into bankruptcy. An insolvent employer may attempt to avoid bankruptcy by making a proposal for a rearrangement of his debts. If the insolvent employer's proposal is rejected by its creditors or by the Court, the employer is deemed to have made an assignment in bankruptcy on the day the proposal was filed.

The bankrupt's property passes to and vests in the trustee in bankruptcy, subject to the rights of secured creditors (Bankruptcy Act, R.S.C. 1970, c.B.-3 (the "B.A."), s.50(5)).

A secured creditor is a person holding a mortgage, pledge, charge, lien or privilege on or against property of the debtor as security for a debt due (B.A., s. 2). The B.A. permits secured creditors to realize on their security against the property of the bankrupt, regardless of the bankruptcy, unless the court orders otherwise (B.A. s. 49(2)).

Property held by the bankrupt in trust for another person is not the property of the bankrupt. It does not vest in the trustee in bankruptcy and is not distributed to the bankrupt's creditors (secured or not) (B.A. s.47(a)) but is distributed to those for whom it was held in trust.

The debtor's property available for distribution to preferred and unsecured creditors is the property left after trust claims have been satisfied and after secured creditors have realized on their security.

The property which remains is distributed firstly to preferred creditors (in the order set out in section 107 of the B.A.). Any remaining property is then distributed among the unsecured creditors.

Wages, salary, commissions, or compensation for services rendered during three months preceding the bankruptcy to the extent of $500 will be a preferred claim in bankruptcy and will rank fourth in priority among the preferred claims, after the expenses and fees of the trustee and certain legal costs incurred administering the bankruptcy (B.A., s.107(d)).

The amount of the claim for wages in excess of $500 is an unsecured claim.

Unsecured claims are paid only after all preferred claims (such as claims for municipal taxes, arrears of rent, and Crown claims under the Workers' Compensation Act, the Unemployment Insurance Act, the Income Tax Act and other federal and provincial Crown claims) are paid (B.A., s.107, s.112). Unsecured claims are then distributed pro rata.

Effectiveness of the Bankruptcy Act Provisions

Since the claim for wages under the B.A. is a preferred claim, it will only be effective if there is property not subject to security. In any event, the claim is a preferred claim only to the extent of $500. This amount represents slightly more than one week's wages for the average employee (the average industrial wage in Ontario in July 1985 was $423.77 per week).

Anything in excess of $500 will rarely be fully recovered since it ranks with all other unsecured claims.

Labour Relations Act-Arbitration Proceedings and Successor and Related Employer Provisions

It is possible under the arbitration, successor employer, and related employer provisions of the Labour Relations Act, R.S.O. 1980 c.228 (the"L.R.A.") for employees of insolvent or bankrupt employers to recover amounts owed them pursuant to a collective agreement if the business is sold to a new employer who is found to be bound by the collective agreement. In such cases, employees also have some degree of job security.

a) Arbitration Provisions:

Every collective agreement must provide for the arbitration of any differences between the parties arising from their collective agreement (L.R.A. s. 44). Thus, any non-payment by the employer of hourly wages or salary (including overtime pay and public holiday pay) owed under the terms of the collective agreement can be arbitrated.

Can arbitration proceedings be used to enforce the provisions of the E.S.A.? An arbitrator who is interpreting provisions governing employees' entitlement to wages under the collective agreement may consider and apply the E.S.A. (McLeod v. Egan (1975) S.C.R. 517, (1974) 46 D.L.R. (3d) 150 (S.C.C.)). The extent to which an arbitrator can not only use the E.S.A as an aid to interpreting the collective agreement, but also incorporate the provisions of the E.S.A. into the collective agreement is, however, a matter of some debate (see, for example, Queens University v. Donald Fraser and Canadian Union of Public Employees Local 1302, (1985) 51 O.R. (2d) 140 (Ont. Div. Ct.) and Re Hotel Dieu Hospital and Ontario Nurses' Association (1984) 46 O.R. (2d) 248 (Ont. Div. Ct.)).

If an arbitrator can incorporate the provisions of the E.S.A. into the collective agreement, such claims as E.S.A. overtime, public holiday, severance and termination pay could be collected using arbitration proceedings and the successor and related employer provisions of the L.R.A. If, however, an abitrator cannot incorporate the provisions of the E.S.A., the employee will have to rely on other mechanisms to recover these claims.

An arbitrator's decision can be filed by any employee or party affected by the decision in the office of the Registrar of the Supreme Court if the employer fails to comply with any terms of the decision. The decision is then enforceable in the same way as a judgment or order of the Supreme Court (L.R.A. s.44(11)).

The successor employer provisions of the L.R.A. may make an arbitrator's decision effective against an employer that purchases all or part of the insolvent employer's business.

Labour Relations Act - Successor Employer Provisions

If an employer is bound by the collective agreement, the person to whom he sells the business becomes bound by the collective agreement "as if he had been a party thereto" (until the O.L.R.B. declares otherwise) (section 63 L.R.A.). Where the union has previously been certified or has given, or could have given notice to bargain to the former owner, the union continues to be the bargaining agent for the employees and the union can serve the new 'owner' with notice to bargain. This provision does not apply where the assets of the employer are sold but not the business itself.

The bargaining rights of the union and the rights of employees under their collective agreement are therefore preserved.

The provisions of this section are commonly referred to as the "successor employer" or "successor rights" provisions of the L.R.A.

If the business of an insolvent or bankrupt employer is sold, the successor rights provision of the L.R.A. may have a significant impact on employees' rights to recover amounts due to them under the collective agreement.

In Re United Brotherhood of Carpenters and Joiners of America, Local 3054 and Cassin-Remco Ltd et al. (1979) 105 D.L.R. (3d) 138 (Ont. H.C.) the Court held that amounts which an arbitration decision awarded to the union could be collected from a purchaser who purchased the business after it went into receivership. The union had attempted unsuccessfully to collect the amount of the arbitration award from the employer before the business was sold by the receiver. After the business was sold, the union attempted to collect the amount of the arbitration award from the purchaser. The purchaser refused to pay and argued that the union would have a priority among execution creditors if it were allowed to collect from the purchaser of the business. The purchaser also argued that the arbitration award was made after the receiver had gone into possession and that the receiver had priority over the union's execution. Further, it was argued that, once the assets had been sold by the receiver under the terms of the debenture, the purchaser took clear of all executions.

The Court rejected these arguments. Mr. Justice Steele stated:

> ". . .I think that the issue of priorities is immaterial. I am of the opinion that the Labour Relations Act creates a special status for collective agreements outside the purview of the general law.
>
> Section 55 [now 63] of the Labour Relations Act provides that the purchaser of a business shall be deemed to be the original signatory to the collective agreement. Therefore, both the union and the purchaser are bound by the terms of the agreement including its benefits and detriments. A benefit may be wage rates differing from those prevailing in the industry.

> A detriment may be an outstanding grievance or, in this case, an execution filed as a result of an arbitrators' award. In other words, the terms and conditions of a labour agreement flow with the business and once the purchaser has acquired the business then he is obligated to all of the matters that are included within it.
>
> In this case, the purchasers are liable as a party to the award. . .
>
> To hold otherwise would frustrate the intent of the Labour Relations Act and would impede the processing of grievances that are ongoing within a collective agreement. It would mean that while companies were in financial difficulties, no grievances under the agreement would be pursued because there would be a danger that any decision resulting therefrom would be nullified by a subsequent sale of the assets whereas if the grievance were not filed until after the sale then the usual results would flow from it." p.142, 143.

In the Cassin-Remco case the receiver was appointed under the debenture. The O.L.R.B. has held that such privately-appointed receivers do not themselves become successor employers - that they are instead agents of the company. As agents of the company, they are bound to observe the terms and conditions of the collective agreement if employees are continued during the receivership. Since they are not successor employers, they do not become personally liable for breaches of the collective agreement which occurred prior to the receivership. Nevertheless, when the receiver sells the business, the purchaser, as a successor employer under the L.R.A., may be liable for past violations of the collective agreement whether or not the purchaser had notice of the existence of a collective agreement (Sunnylea Foods Limited (1981) O.L.R.B. Rep. Nov. 1640). The O.L.R.B.'s position has been stated as follows:

> "The Board under section 63 of the Act issues a declaration of legal rights only, and does not, on its own, make any findings of past liability consequent upon that declaration. Where a collective agreement is in effect, subsection (2) of section 63 provides that:
>
> ". . .the person to whom the business has been sold is, until the Board otherwise declares, bound

> by the collective agreement as if he had been a party thereto. . ."
>
> so that normally a retroactive finding of liability, enforceable through the grievance and arbitration procedures of the collective agreement, flows from a declaration of a "sale" by the Board"
>
> Hamilton Cargo Transit Limited
> (1983) O.L.R.B. Rep. June 887 at p.894.

Even if the collective agreement has expired, the terms of the collective agreement, including the arbitration provisions may still be in effect (L.R.A. s.79).

If there was no collective agreement in effect at the time of the sale and there were no outstanding grievances or arbitration awards, the successor employer will not likely be liable for past violations of a collective agreement (it might, however, be liable for past unfair labour practices of which it had knowledge or in which it participated.[1])

Thus, the successor employer provisions of the L.R.A. mean that the union may be able to make a claim on the employees' behalf against the purchaser of the business where amounts owed to employees under the collective agreement were not paid by the insolvent employer.

Most of the cases considered by the O.L.R.B. have involved privately appointed receivers who have acted as intermediaries in the sale of the insolvent employer's business. There are, however indications that similar principles will be applied in cases involving court-appointed receivers and trustees in bankruptcy.

In Marvel Jewellery Limited and Danbury Sales (1971) Ltd., [1975] O.L.R.B. Rep 733, Marvel defaulted on debentures and a receiver manager was appointed by the Court. The receiver subsequently accepted an offer of sale and it was approved by the Court. The O.L.R.B. found that the purchaser was a successor employer.

In Chandelle Fashions [1982] O.L.R.B. Rep. 828, the O.L.R.B. discussed the sale of a business provisions in the context of a bankrupt business. Likewise, in Biltmore/Stetson (Canada) Inc., [1983] O.L.R.B. Rep. Jan. 9, a trustee in bankruptcy was instrumental in the sale of a business to an employer which was found to be a successor employer (upheld, 150 D.L.R. (3d) 577 (Ont. C.A.)).

In an application under s. 63, the O.L.R.B. will decide, if necessary, whether the ultimate purchaser has purchased the business and is therefore a successor employer. The O.L.R.B.'s test is "whether or not there is a continuum of the business of the employer who was the original party to the collective agreement and not whether the purchasing employer bought directly from the employer named in the collective agreement." (Culverhouse Foods Limited, (1976) O.L.R.B. Rep. Nov. 691 at p. 693; also Big Bear Storage (1979) O.L.R.B. Rep. March 164).

The ultimate purchaser may be found by the O.L.R.B. to be a successor employer whether or not a receiver or trustee has been an intermediary in the sale and whether or not the receiver or trustee was an agent for the predecessor company or an intermediate successor employer.

Successor Employer's Obligation to Hire Employees

The successor employer provisions also protect employees' jobs. The O.L.R.B. has held that a successor employer has an obligation to retain his predecessor's employees unless those employees could be laid off or their employment terminated in accordance with the terms of the collective agreement.

In Emrick Plastics Inc. [1982] O.L.R.B. Rep. June 861 the successor employer argued that under section 63 of the L.R.A., it was bound to observe the terms of the collective agreement but it was "under no obligation to hire any of the predecessor company's employees and that the seniority and service of any of these employees that it did hire dated only from the point of such hire" (p. 861). The business had been in the hands of a receiver appointed under the terms of a debenture prior to the sale. Although the receiver had given employees a form of notice of termination, the O.L.R.B. concluded that the purchaser had the same obligation to recall employees and recognize seniority as the predecessor employer.

The Emrick Plastics Inc. case was followed by the O.L.R.B. in the Daynes Health Care Limited, [1984] O.L.R.B. Rep. Aug. 116 (MacDowell). In that case the majority of the Board stated:

> When . . . [the successor employer] acquired the business it stood precisely in the shoes of its predecessor. It inherited an established complement of employees with established contractual rights. Some of these employees were on layoff and had recall rights which they could assert before there could be any new hires. More importantly, there was a much larger group of employees who had been actively employed right up to the date of the sale. Those employees were not, and could not have been , terminated without just cause - which cause could not be based solely on the impending sale. Nor could they be "laid off" from their jobs when those jobs and their work continued. If it were otherwise, the purpose and intended effect of section 63 would be substantially undermined."

Thus, the collective agreement rights of employees of insolvent employers (including their recall rights and rights such as their seniority rights), can be protected by the successor rights provisions of the L.R.A.

Receivers' or Trustees' Liability for Wages and Obligation to Hire Employees

Privately-Appointed Receivers:

Boards in certain other jurisdictions have found privately-appointed receivers to be successor employers.[2] However, the O.L.R.B. has concluded that privately appointed receivers generally do not become successor employers when they take over the operation of a business. Instead, they are agents of the insolvent company. Nevertheless, they are obligated to observe the terms of the collective agreement. If they do not observe the terms and conditions of the collective agreement, the O.L.R.B. may find that the receiver has committed an unfair labour practice (e.g. on the basis that the receiver has interfered with the representation of the employees by the union and the administration of the union contrary to section 64 of the L.R.A.). The receiver may also be found to have acted in violation of section 66(b) of the L.R.A. "to the extent that it effectively imposed conditions of employment the terms of which were in violation of the rights of the employees under the Act and under their collective agreement" (Price Waterhouse Ltd. (re Windsor Packing Company) [1983] O.L.R.B. Rep 944 at p. 957). The effect of the O.L.R.B.'s decisions is to protect privately appointed receivers from personal liability for the insolvent company's breach of the collective agreement while at the same time ensuring that the terms and conditions of the collective agreement are observed during the period of receivership.

Court-Appointed Receivers:

The situation for court-appointed receivers may be significantly different.

In the Chateau Gardens[3] case, the O.L.R.B. stated that no distinction ought to flow from whether receivers and managers are appointed under the terms of a private instrument or by a court. However, the Ontario High Court subsequently distinguished privately-appointed receivers from court-appointed receivers when directions were given concerning priorities among unsecured creditors in the case.[4] Madame Justice Van Camp stated:

> "The Labour Relations Board has held that there is no sale of the business under setion 63 to a private receiver as the company keeps legal and equitable ownership and its obligations continue as long as it functions in spite of the appointment of the receiver: see. . . Cassin-Remco [supra] . . .
>
> "The private receiver is an agent not a successor bound by the collective agreement . . . [The court-appointed receiver-manager] acts as principal and is not personally liable to the company for his acts. He is an officer of the Court and not of the company. He holds a fiduciary relationship to all creditors. The company remains in existence but has lost its title to and control of its assets." (p.757).

She held the court-appointed receiver-manager was a principal, not an agent of the insolvent employer and therefore a successor employer. As such, the receiver manager became liable to pay retroactive wages which involved a period of employment both before and during the receivership period. The payment for retroactive wages was to be made in priority to the claims of all other creditors including the secured creditors. (Madame Justice Van Camp's decision has recently been applied by the British Columbia Labour Relations Board.[5])

It therefore appears that, if court-appointed receiver-managers continue the insolvent employer's business, wages or benefits owing under the collective agreement for the period prior to and during the receivership may have priority over the claims of all other creditors.

Trustees in Bankruptcy:

Although a trustee in bankruptcy is also deemed to be a principal, rather than an agent of the insolvent employer, it is unlikely that a court would find such a priority to exist where the trustee has carried on the business in the hope that it could be sold as a going concern. Such a priority would appear to conflict with the priority provisions set out in the Bankrupcy Act. Since the Bankruptcy Act, as federal legislation, is paramount to provincial law in the field of a bankruptcy and insolvency, the provisions of the Bankruptcy Act prevail. Nonetheless, if the trustee did sell the business, the O.L.R.B. could find that the purchaser of the business was a successor employer. If the insolvent employer had not paid wages or benefits payable under the collective agreement, the successor employer could be required to do so.

As indicated above, the O.L.R.B. has held that purchasers of businesses of bankrupt employers were successor employers. It has not, however, been required to decide whether such employers become liable for the amounts unpaid by the bankrupt employer under the collective agreement. Such an issue might also come to be determined in the arbitration of a grievance filed for wages owing to employees.

In either case, the effect of the Bankruptcy Act would have to be determined. When the business of the bankrupt is sold, and the proceeds from the sale of the bankrupt's property are distributed by the trustee in bankruptcy to creditors, (including employees with wage claims), does this discharge the wage claim liability, or do the employees continue to have a claim against a successor employer for amounts unpaid? If an order of discharge is given under the Bankruptcy Act, does this discharge all wage claims or does it merely discharge the claims against the bankrupt while still leaving the employees free to pursue the successor employer for their outstanding claims? Does section 63 of the L.R.A. have the effect of permitting the bankrupt's liability to carry through to the successor employer?

Under the Bankruptcy Act, a bankrupt corporation may not apply for discharge unless it has satisfied the claims of its creditors in full (B.A., s.139(4)). If the bankrupt employer is not a corporation it can apply for discharge even though claims have not been satisfied in full. If it is discharged, the order of discharge "releases the bankrupt from all . . . claims provable in bankruptcy" (except those set out in s.148(1) of the B.A. s.148(2)).

It could be argued that the distribution and discharge scheme of the B.A. does not conflict with the provisions of the L.R.A. since the B.A. does not deal with the liabilities of a successor employer and the sale takes place prior to discharge. Unless there is a conflict between the B.A. and s.63 of the L.R.A., the B.A "shall not be deemed to abrogate or supersede the substantive provisions of any other law or statute relating to property and civil rights" (B.A. s.50(6)). Also, the Cassin-Remco and Chateau Gardens cases (supra.) indicate that a successor employer in receiverships will assume the wage liabilities of the predecessor employer. It would therefore be consistent with these cases for a successor employer purchasing the business of a bankrupt employer to be found liable for the bankrupt employer's liabilities under the collective agreement.

On the other hand, it could be argued that such an interpretation would cause provincial labour law to conflict with the B.A. since the unpaid liabilities under the collective agreement would be paid whereas the successor employer would not be required to pay the claims of other creditors. In effect, the sale price (and therefore the money available to pay other creditors) would be reduced by the amount of the claims under the collective agreement if the successor employer is liable to pay such claims. Thus claimants under the collective agreement would recover 100% of their claims, whereas other creditors would recover less than if the successor employer were not liable for the bankrupt employer's liabilities under the collective agreement.

Effectiveness of the L.R.A. Successor Employer Provisions:

The L.R.A. successor employer provisions can be resorted to by employees to recover wages owed by a predecessor employer and to provide some job security where there has been a sale of all or part of the business of a predecessor employer bound by a collective agreement. However, in cases where the insolvent employer's property is sold as assets only and not as a business, employees covered by a collective agreement will have no greater wage protection than other employees since the successor employer provisions do not apply.

Labour Relations Act - Related Employer Provisions

Where the O.L.R.B. finds that related businesses are carried on by one or more corporations or firms which are under common control or direction, the O.L.R.B. may treat the corporations or firms as one employer for the purposes of the L.R.A. (s. L.R.A., s1(4)).

In some circumstances, employees of an insolvent employer may establish that a solvent employer is a "related employer" within the meaning of section 1(4) and thereby claim unpaid wages from the solvent "related" employer. However, the O.L.R.B. has indicated that:

> "The purpose of section 1(4) of the Act is to preserve bargaining rights. It is not intended to give a party to a collective agreement the right to a "deep pocket" recovery of an unsatisfied debt against a related corporation." (Total Marketing Incorporated, [1983] O.L.R.B. Rep. April 616 at 617).

The O.L.R.B. has not permitted section 1(4) to be used by employees to recover claims arising before a receivership from a solvent privately-appointed receiver-manager or from a solvent creditor which appointed the receiver-manager (Price Waterhouse and C.I.B.C., [1983] O.L.R.B. Rep. 1706). The O.L.R.B. has also not permitted employees of a bankrupt subsidiary to recover unpaid wages from a solvent parent company (Total Marketing Incorporated supra.).

However, if two interrelated companies arrange their affairs so that one has no assets in order to avoid recovery by employees of liabilities arising under the collective agreement, the O.L.R.B. will likely declare that the companies are related within the meaning of section 1(4). This, in effect, would permit the employees to recover their unpaid wages from the solvent company.

Also, if one company simply undergoes a change in corporate form but the business continues to be carried on for the same principal(s), the O.L.R.B. may apply section 1(4). In most such cases, the 'sale of a business' provisions of section 63 would also apply. However, in some cases there may be few transferrable assets and section 1(4) may therefore be more clearly applicable than the sale of a business provisions (see, for example, Brant Erecting [1980] O.L.R.B. Rep. July 945, where the only element of one business which might have been "transferred" to the second business was the personality of a principal).

Effectiveness of the L.R.A. Related Employer Provisions

If the O.L.R.B. finds an insolvent employer and a solvent employer to be related employers, effective wage protection results because the wage claims can then be treated as wage claims against the solvent employer. However, the related employer provisions will be applicable in a very limited number of cases.

Employment Standards Act – Related Employer Provisions

Section 12 of the E.S.A provides that, where related businesses are carried on by one or more corporations or firms which are under common control or direction and a person is or was an employee of such corporations, firms or "any combination thereof", an employment standards officer can treat them as one employer for the purposes of the E.S.A.

Thus, if a person is employed or has been employed by two corporations under common control and carrying on related businesses, he or she could recover wages owing by one (e.g. insolvent) corporation from the other (e.g. solvent) employer.

However, the Employment Standards Branch has generally interpreted this section to mean that the employee must have been employed by both corporations (although not necessarily at the same time). Thus, for example, if A Ltd., and B Ltd. carry on businesses which are related in their functions or operations, and A becomes insolvent, A's employees cannot claim against B. Ltd. for wages owed, even though the same principal owns and controls both A and B, unless they have been employed by both A and B.

Effectiveness of the E.S.A. Related Employer Provisions:

Although the effect of the section is to treat the wage claims of employees of an insolvent employer as claims against a solvent employer, in view of the requirement that employees be employed by both employers, the section will very seldom be applicable.

Employment Standards Act - Successor Employer Provisions

The E.S.A. 'sale of a business ' provisions (section 13) do not permit an employee of an insolvent employer to recover unpaid wages or salary (other than vacation pay) from a successor employer. The E.S.A. successor employer provisions simply provide that if a successor employer employs the employees, their employment is not terminated by the sale and their period of employment with the predecessor employer is deemed to have been employment with the successor for the purposes of the service requirements for E.S.A. public holiday pay, vacation pay, pregnancy leave, termination and severance pay.

Construction Lien Act

The Construction Lien Act, S.O. 1983, c.6 (the "C.L.A.") provides wage protection for Ontario construction workers by creating a trust and a lien for their wages.

Trust:

Under the C.L.A., amounts owing to a contractor or a subcontractor, or received by a contractor or subcontractor for construction work, constitute a trust fund for the benefit of certain persons, including workers, who have worked on the construction project (C.L.A., s.8). As trustee of such money, the contractor or subcontractor must pay any wages he owes to workmen on the project before he can use the money for his own purposes (C.L.A., s.8(2)). If he does not do so, he can be liable for breach of trust. Any director, officer or other person who has effective control of a corporate contractor or subcontractor and who "assents to, or acquiesces in" the breach of trust may also be liable for breach of trust (C.L.A., s.13).

Lien:

A workman has a lien for wages earned for construction work which he performs. The lien is a "lien upon the interest of the owner in the premises improved for the price of. . .services" (C.L.A., s.14). The lien arises when he first supplies his services to the construction (C.L.A., s.15). The lien is also a charge on the "holdbacks" which are amounts 'held back' by persons (including the owner and contractor) who are required to make payments for the construction. Each payer upon a contract or subcontract under which a lien may arise must retain a holdback of 10% of the price of services or materials supplied (C.L.A., s.22). A 'finishing' holdback and a 'notice' holdback are also required (C.L.A., s. 22(2), 24(1)).

Generally, to preserve his lien, the worker must register a claim for lien on title before the end of the 45th day after the day he last worked on the construction if his lien attaches to the premises (C.L.A., s.31(3), 34(1)) or the worker must give the owner a copy of the claim for lien plus an affidavit before the end of the 45th day following the last day on which he worked on the construction if his lien does not attach to the premises (C.L.A. s.31(3), 34(1)). The lien must be perfected before the end of the 45th day following the last day on which the lien could have been preserved (C.L.A. s.36(2)). Generally, a worker perfects his lien by beginning an action to enforce the lien and (if the lien attaches to the premises) registering a certificate of action on the title of the premises (C.L.A. s.36(3)).

The C.L.A. provides that workers have a lien in priority of any other person of the same class to the extent of the amount of 40 regular-time working days' wages (s.83(1)).

The C.L.A. also gives workmen a priority in the recovery of any trust money (sections 8, 87(1) and (2) of the C.L.A.).

In addition, if the employer is required to make contributions to a worker's trust fund such as contributions for vacation and statutory holiday pay, pension, welfare and training or supplementary unemployment insurance funds, the trustee of the fund can pay the amount owing and the trustee of the fund may register a lien and enjoy the workmen's priority (C.L.A. s.83(2)).

Effectiveness of C.L.A. Trust and Lien Provisions:

The C.L.A. trust provisions, holdback provisions, lien provisions and priorities for workmen's wages provide construction workers with a number of remedies which can be effective in a receivership or bankruptcy situation.

A holdback is more likely to be available since it is held by someone other than the insolvent employer (e.g. by the owner on money to be paid to the contractor who employs the employees, or by the contractor on money to be paid to the subcontractors who employ the employees). Also, if the proper moneys have not been held back, a (solvent) party can be pursued for the loss resulting from its failure to keep the proper hold back (C.L.A. s.23, 24). An owner is personally liable to those lien claimants for whom he holds the holdback to the extent of the holdback (C.L.A. s.23). In addition, section 80(2) gives lien claimants a priority over any 'building mortgage' to the extent of any deficiency in the holdback required to be retained by the owner.

The trust provisions of the C.L.A. remove amounts due workmen from amounts which would otherwise be available for distribution to creditors of an insolvent employer. (Re Walter Davidson Co. (1957) 36 C.B.R. 65 (Ont.), McAvity v. C.I.B.C. (1959) 37 C.B.R. 1, affirmed 38 C.B.R. 10(S.C.C.), Rosemount Tile and Terrazo Ltd. v. Board of Education (1960), 1 C.B.R. (N.S.) 63 (Ont. S.C.)).

The lien provisions also give the workmen a registered interest in the property which helps ensure payment of wages.

Workers may lose their lien protection because they have not preserved or perfected their rights within the time periods set out in the C.L.A. There also may be problems getting accurate information within such time periods (e.g. with respect to amounts payable to a worker's trust fund for benefits).

In addition, the 10% holdback may not be sufficient to pay all wages owing. Nonetheless, the provisions of the C.L.A. and its predecessor Mechanics Lien Act have provided relatively effective protection for construction workers' wages in bankruptcies and receiverships. Provisions which have been added in the C.L.A., such as the provisions for workers' trust funds and the provision providing for the non-waiver of rights and remedies provided by the C.L.A. (C.L.A. s.4) should further strengthen the protection afforded construction workers.

Ontario Business Corporations Act

The Ontario Business Corporations Act, S.O. 1982, c.4 (B.C.A.) permits employees of a corporation to sue the directors of a corporation "for all debts not exceeding six months' wages that become payable while they are directors for services performed for the corporation and for the vacation pay accrued while they are directors for not more than 12 months..." (B.C.A. s.131).

The director is liable for the wages and vacation pay only if:

a) he is sued while he is a director or within 6 months after he ceases to be a director; and

b) the action against the director is commenced within 6 months after the debts became payable, and

    i) the corporation is sued in the action against the director and execution against the corporation is returned unsatisfied in whole or in part, or

    ii) before or after the action is commenced the corporation goes into liquidation, is ordered to be wound up or makes an authorized assignment under the Bankruptcy Act (Canada) or a receiving order under the Bankruptcy Act (Canada) is made against it and in any such case, the claim for debts is proved (B.C.A. s. 131 (2)).

If a director pays the debt for wages or vacation pay proved in liquidation, dissolution or bankruptcy proceedings, the director is entitled to any preference that the employee would have been entitled to (B.C.A. s.131 (4)).

Effectiveness of the B.C.A. Provision:

The effectiveness of this section is limited because the directors may be insolvent or the employee may fall victim to the statutory time periods.

An action may not be commenced more than six months after a director ceases to be a director. In almost all cases, employees will have to rely on the most recent listing of directors which the employer has filed with the Ministry of Consumer and Commercial Relations to identify the directors of the corporation. The information on file is often out of date. Directors may have resigned or changed and the employer corporation may not have filed notice of this change with the Ministry. Thus, the employee may sue the wrong directors and may be beyond the time periods when he or she receives accurate information.

The B.C.A. also requires the action against the director to be commenced within 6 months of the debt for wages becoming payable. If the employee is pursuing the corporation for wages, the employee might miss this time period for suing. For example, a decision in an arbitration against the employer may not be rendered within the six month period and if the employee cannot recover the amount of the award from the employer he or she is then out of time for bringing an action against a director.

In addition, the limitation of wages recoverable to wages and vacation pay restricts the effectiveness of the B.C.A. provision. Termination pay, severance pay and damages for wrongful dismissal are not recoverable using this provision. The costs and potential delay of court proceedings (or of the required attempts to execute against the corporate employer) also reduce the effectiveness of this section.

Canada Business Corporations Act

Some employees employed by corporations coming under The Canada Business Corporation Act, S.C.1974-75, c.C-33 (the "C.B.C.A.") are nonetheless within provincial jurisdiction in labour relations matters. Therefore the effect of the C.B.C.A. must be considered. For these employees, the directors' liability for wages is set out in section 114 of the C.B.C.A.

Pursuant to section 114 of the C.B.C.A., directors of a corporation are "jointly and severally liable to employees of the corporation for all debts not exceeding six months wages payable to each such employee for services performed for the corporation while they are such directors respectively."

Unlike the B.C.A., the C.B.C.A. does not specifically protect vacation pay.

The time periods for commencing an action against a director under the C.B.C.A. differ from time periods under the B.C.A. A director is not liable under the C.B.C.A. unless sued for wages while he or she is a director or within two years after he or she has ceased to be a director (a longer period of time than the B.C.A.'s 6 month period).

Also, the C.B.C.A. requires that the corporation be sued within 6 months after the wages have become due (unless the corporation is liquidated, dissolved or in bankruptcy in which case the wage claim must be proved within 6 months of the liquidation, dissolution, or B.A. assignment or receiving order). If the corporation has been sued within the six month period, an action against the director could be commenced more than 6 months after the wages become due (unlike the provisions of the B.C.A.).

Effectiveness of the C.B.C.A. Provision

Although the time periods for commencing an action against a director are less restrictive under the C.B.C.A., the effectiveness of the provisions are limited by the same difficulties encountered with the B.C.A. provisions - insolvent directors, the expense and delay of court proceedings, and the restrictive definition of wages which excludes termination pay, severance pay and wrongful dismissal damages

Bank Act

Pursuant to section 178 of the Bank Act, S.C. 1980, c.40, banks take specific forms of security for certain types of loans - particularly in the manufacturing and agricultural sectors.

If, under the Bankruptcy Act, a receiving order is made against, or an assignment is made by, a person who has given section 178 security, certain wages are given priority over the rights of the bank enforcing the section 178 security. Those wages are defined in section 178(6) of the Act as follows:

> "claims for wages, salaries or other remuneration owing in respect of the period of three months next preceding the making of such order or assignment, to employees of such person employed in connection with the business or farm in respect of which the property covered by the security was held or acquired by such person. . ." (section 178 (6)).

However this priority is only effective if the employer is bankrupt.

Effectiveness of Bank Act Priority:

In many cases, creditors will have some other form of charge (e.g. a mortgage, a general security agreement) on the property subject to the section 178 charge.

The bank's section 178 security covers property not even in existence at the time the bank takes such security. The bank may therefore prefer to use its section 178 charge instead of some other form of security instrument which it may hold. However, if the bank realizes its security by relying upon its section 178 charge, the three month wage priority prescribed by section 178 will be effective but only if there is a bankruptcy. If the employer is not bankrupt, this wage priority will not be effective.

Also, if the creditor realizes on the security by resorting to a security instrument other than the section 178 charge, the Bank Act wage priority will be ineffective.

PAY IN LIEU OF NOTICE

Employees' Contracts of Employment

Both the common law and the E.S.A. require employers to give notice of termination to employees employed for an indefinite period of time unless there is just cause for their dismissal. The insolvency or bankruptcy of the employer is not recognized as just cause for dismissal.

WRONGFUL DISMISSAL AT COMMON LAW

At common law, employees employed for an indefinite period of time are entitled to reasonable notice of their dismissal unless they are dismissed for just cause or unless a period of notice is specified in their contract of employment.

At common law, if an employer goes out of business, its employees can sue for wrongful dismissal if they have not been given the proper notice, since the business's closure is considered to be constructive dismissal[6].

The private appointment of a receiver-manager does not necessarily terminate employment contracts because the business (and therefore the employer) may not change. The receiver may be an agent of the employer and the employee's service may therefore be uninterrupted. However, the privately-appointed receiver at common law terminates the contract of employment by selling the business because the employee's employer has changed.[7]

At common law, the court-appointment of a receiver, or the appointment of a trustee in bankruptcy generally terminates employment contracts. The employee then has a right of action against his predecessor employer for wrongful dismissal. If the court-appointed receiver or trustee decides to employ the employees on an indefinite basis and subsequently terminates their employment, the receiver or trustee must give the employees reasonable notice prior to such termination, but the period of employment considered by the courts for the determination of such notice is the employee's period of employment with the receiver or trustee and not his or her period of employment with the predecessor employer.[8]

Moreover, if an employee has a claim for wrongful dismissal against the predecessor employer but continues to work for the receiver or trustee, wages earned while employed by the receiver or trustee are considered by the court as mitigation of the employee's damages and therefore reduce the employee's claim against the predecessor employer.

Effectiveness of Wrongful Dismissal Claims:

Since claims for wrongful dismissal are unsecured, an employee will not recover amounts owing unless a surplus remains after preferred and secured creditors have been paid. In any event, such a surplus is distributed rateably among all unsecured creditors, so that the employee usually recovers but a fraction of his or her claim for damages for wrongful dismissal.

Recent claims for wrongful dismissal have arisen in bankruptcy cases. It is interesting to note that such claims have arisen in situations where employees might not have been entitled to make an E.S.A. termination pay claim (because of the E.S.A.'s "temporary layoff" provisions, or because of the Malone Lynch case infra).

A laid off employee will usually be required to be laid off for at least 13 weeks and have his or her fringe benefits cut-off, before the Employment Standards Branch will find the employee has been terminated and therefore entitled to notice, or pay in lieu thereof, under the E.S.A. and Regulation 286 to the E.S.A. If the employee takes another permanent job during the period of layoff, the employee is generally considered by the Employment Standards Branch to have 'quit' instead of been terminated and the employee therefore loses his or her right to pay in lieu of notice under the E.S.A. However, some lay-offs may be determined by the Employment Standards Branch to be terminations, depending on the circumstances of the lay-off.

Several recent cases have indicated that claimants in wrongful dismissal cases will not be held to the same test of termination as will employees under the E.S.A. If an employee is terminated at common law, the employee will be able to claim for wrongful dismissal, regardless of whether or not the employee would be terminated under the E.S.A.

Thus, in Re Dahmer Steel Limited; Thorne Riddell Inc. v. Kreutzkamp (decision of Mr. Justice Sutherland rendered June 11, 1985, as yet unreported), the Court found that a laid-off employee who found another job within approximately one month of lay-off was entitled to damages for wrongful dismissal regardless of the fact that the employee may have been on temporary lay-off rather than terminated within the meaning of the E.S.A.

Likewise, in Edward Kenning v. Dahmer Steel Limited (decision of Mr. Justice Eberle rendered May 23, 1985, as yet unreported), the claimant was found to have been terminated for the purposes of a wrongful dismissal claim, although he may not have been terminated under the E.S.A. The claimant had been laid off for approximately 8 months before he sued. During this period of lay off, and possibly up to the date of bankruptcy, the company had continued to make contributions to various insurance plans on behalf of the employee. It had also made some contributions to the pension plan with respect to the claimant. Nonetheless, the Court applied common law principles and found that the employee was dismissed and was entitled to 11 months notice. The employee therefore had a claim in bankruptcy for 11 months salary and employer's pension contributions during that eleven month period.

Although an employee will often be able to recover more in a wrongful dismissal action than he or she could recover under the E.S.A. as termination pay, the expense and delay of a court action and the uncertainty of recovery may dissuade employees from bringing such actions.

If the employee obtains judgment but is unable to recover payment prior to the receivership or bankruptcy, the employee ranks as an execution or unsecured creditor. In a receivership, the execution creditors rank as unsecured creditors.

In a bankruptcy, the employee does not have the preferred status afforded by s.107(1)(d) of the B.A. since the claim for damages is not a compensation for services rendered during the three months preceding the bankruptcy.[9] The employee's wrongful dismissal judgment therefore ranks as an unsecured claim.

TERMINATION PAY PURSUANT TO THE E.S.A.

The E.S.A. requires employees employed for at least 3 months to be given written notice prior to termination. Depending on the length of the period of employment, up to 8 weeks notice is required where the employer terminates fewer than fifty employees.

If an employer terminates fifty or more employees in a period of four weeks or less, employees are entitled to 8 to 16 weeks notice depending on the number of employees terminated regardless of the length of the period of employment. Up to 8 weeks notice is required where the employer terminates fifty or more employees who represent not more than ten per cent of his workforce and there is no permanent discontinuance of all or part of the business (E.S.A. s.40(1), Regn. 286 s.5).

Collective agreements or individual contracts of employment may also require pay in lieu of notice.

The E.S.A. will deem a termination to have occurred even if the employee continues to be an employee for some purposes (Regn. 286, s.1). For example, an employee who has been laid-off for more than 13 weeks and has received no wages or benefits will likely be deemed to be terminated under the E.S.A. Thus, the employee may qualify to receive termination pay, although he or she continues to have recall and other 'employment' rights under the collective agreement.

Unlike in a common law wrongful dismissal action, earnings from another employer during the notice period do not reduce the employee's claim for termination pay under the E.S.A. and an employee terminated by an employer without notice and subsequently re-employed by another employer remains entitled to full termination pay.

Questions arise where the employer advises the employee that he or she is 'laid-off' which do not arise when the employee is advised that he or she is terminated.

For example, has the employee been terminated although he or she has been notified of a "lay-off", not a discharge? This problem is common with unionized employees because the collective agreement may provide that employees are "laid-off" even if there is no prospect of the employees being recalled. Does the payment of certain benefits during the period of lay-off preclude the determination that a termination has occurred? If an employee accepts another job prior to being on lay-off for 13 weeks, is this a 'quit' rather than a 'termination' under the E.S.A.? If so, are these employees considered when determining whether fifty or more employees have been terminated?

Although the entitlement of many employees to termination pay may be uncertain, if the employee is entitled to termination pay, the following provisions may be used to attempt to recover that termination pay.

E.S.A. Priority and Enforcement

The E.S.A. defines "wages" to include any payment to be made by an employer to an employee under any contract of employment or under the E.S.A. Wages therefore include the termination pay payable in accordance with the provisons of the E.S.A. or the terms of a collective agreement or an individual contract of employment.

Since the priority created by section 14 of the E.S.A. and the E.S.A. enforcement provisions apply to termination pay claims, the discussion on pages 4 to 6 above applies to termination pay.

For the reasons set out above with respect to hourly wage and salary claims, the E.S.A. priority, letter of garnishee and employment standards officers or Referee's decisions or orders are not effective unless a sufficient surplus remains after secured creditors have realized their security. However, a section 60 prosecution might result in the recovery of unpaid termination pay from the officers or directors of a corporate employer.

The sum of $4,000 plus severance pay is the maximum amount for which an employment standards officer's order can be issued under s.47(1)(c). The employee may be required to abandon any claim in excess of this amount.[10] Thus, even if a surplus remains to pay unsecured claims, the amount of termination pay to be collected by filing a certificate and enforcing it as a judgment or order of the court under s.54 is effectively limited.

The maximum E.S.A. s.14 priority is $2,000 per employee. This represents less than 5 weeks termination pay for the employee earning the average industrial wage. Employees entitled to more than $2,000 for total wage claims including termination pay will have no priority for their claim in excess of $2,000.

Director's Liability

Employees may be able to collect unpaid termination pay if a section 60 prosecution is brought against any officer, director or agent of a corporate employer who authorized, permitted or acquiesced in the failure to give notice or to pay wages in lieu of notice. As indicated at page 6 above, directors may be insolvent or it may be difficult to obtain a conviction. Prosecutions are uncommon.

If a privately appointed receiver is an agent of the corporate employer (as various cases hold), can it be prosecuted under s.60 if it permits the employer to terminate the employees without notice and without termination pay or if the receiver in fact terminates the employees and fails to pay termination pay?

Employment Standards Act: Successor Employer Provisions

The successor employer provisions of the E.S.A. do not make a successor employer liable for the wages (other than vacation pay) which the predecessor employer has not paid.

At common law, an employee's contract of employment is terminated when a business is sold. If the new owner of the business hires the employee, wages earned working for the new employer mitigate the employee's damages.

Under the E.S.A, this common law duty of mitigation is changed. Although an employee will not be able to collect termination pay if he or she refuses an offer by his/her employer of reasonable alternate work, the employee can refuse an offer of employment with a successor employer and still be entitled to termination pay . Also, if the terminated employee is hired elsewhere, the employee remains entitled to termination pay.

Under the E.S.A., if a successor employer employs an employee of the predecessor employer, the E.S.A. provides that the employee's employment is not terminated by the sale E.S.A., s.13. If the successor employer later terminates the employee, the employee's period of employment for E.S.A. termination pay purposes will include the employee's period of employment with the predecessor employer.

Since the E.S.A. successor employer provisions provide that the employee's employment is not terminated by the sale, the predecessor employer will not be liable to pay an employee termination pay if the successor employer employs the employee. Possible exceptions to this may arise if the predecessor employer in fact terminates the employee or is deemed to have done so under the E.S.A.

There are conflicting decisions as to whether or not a predecessor employer can give effective notice of termination so that the successor employer does not have to recognize accumulated years of service with the predecessor. Several cases decided by the E.S.A. referees have said this can be done;[11] several cases have held that it cannot—that notice of termination by a predecessor employee does not take effect where the employee continues to be employed by the successor employer.[12] If the predecessor employer can effectively terminate employees, employees who are unable to recover termination pay because there is no surplus after secured creditors realize on their security, could, nonetheless be treated by the successor employer as newly hired employees for E.S.A. service purposes. On the other hand, if the predecessor cannot effectively terminate employees, this may discourage successor employers from hiring the employees and it might discourage the predecessor employer from attempting to give proper notice. The issue of whether or not the predecessor employer can terminate employees (and thereby, permit the successor employer to treat the employees as 'new hires' for E.S.A. service purposes) has not been conclusively determined.

Also, in some cases, employees may be laid off more than 13 weeks before being hired by the successor employer. In such cases, there may be a deemed termination under the E.S.A. regardless of whether or not there is a 'sale of a business' to a new employer (Regulation 286, section 15(2). In such cases, the predecessor would be liable to give notice or pay in lieu. Even if employees were unable to actually recover the termination pay owed by the predecessor, the successor employer may, nonetheless, be entitled to treat them as 'new hires' for the purposes of E.S.A. termination pay because there has been a break of more than 13 weeks between periods of employment (Regulation 286, section 15(2)).

Liability of Receivers:

A 'sale of a business' within the meaning of E.S.A. section 13 includes "leases, transfers, or any other manner of disposition." It has been argued that this might include a disposition to a receiver.

Following Maritime Life Assurance v. Chateau Gardens (supra) and Ostrander v. Niagara Helicopters Ltd. (1973), 1 O.R. (2d) 281, a Court could find that a privately-appointed receiver acts as agent for the insolvent employer but a Court appointed receiver acts as principal.

Thus, a privately appointed receiver would likely be acting for the company if he retained the employees during the receivership and terminated them later. As agent, the receiver would avoid personal liability.

Could a court-appointed receiver, who employed and then terminated an employee, become liable for termination pay based on the employee's period of employment both prior to and during the receivership? Although the wording of section 13 is somewhat different than that of the L.R.A., the Maritime Life Assurance v. Chateau Gardens case (supra) may mean that this could happen. On the other hand, a court-appointed receiver has not been treated as a successor employer by an E.S.A. referee (Northern Hennick and Co. Ltd, decision 550, September 25, 1978, (Davis)) or by a court interpreting similar legislation (Toronto Dominion Bank v. Leonard Industries Ltd. et al. (1983) 49 C.B.R. (N.S.) 241 (Sask. Q.B.)).

Effectiveness of the E.S.A. Successor Employer Provisions:

The successor employer provisions of the E.S.A. do not require a successor employer to pay termination pay owed by the predecessor employer. Thus, the provision does not provide an effective method of recovering termination pay owed by a predecessor employer. However, the section also raises questions as to whether or not a predecessor employer can terminate employees and therefore be liable for termination pay under the E.S.A. if the successor hires employees. If the predecessor employer can do so, the employees who are terminated by insolvent employers could recover little termination pay yet be treated for E.S.A. service purposes as 'new hires' by a successor employer.

Bankruptcy Act

If an employer is bankrupt rather than in receivership, employees may not be able to make a claim for termination pay under the E.S.A.

In Re Malone Lynch Securities Ltd. [1972] 3 O.R. 725 (Ont. S.C. in Bankruptcy), Mr. Justice Houlden held that an E.S.A. termination provision does not apply to termination of employment caused by the bankruptcy of the employer. Mr. Justice Houlden based this decision on an examination of the provisions of the E.S.A. He referred to the provisions requiring the employer to co-operate with the Minister of Labour during the period of notice to facilitate re-employment of terminated employees; and the provision providing that, where notice has been given in accordance with the E.S.A., the employer is prevented from altering wages. Mr. Justice Houlden also referred to section 13(2) (now 40(2)) which provides that terminations of more than 50 employees shall not take effect until the expiry of the notice required by s. 40(2)). He concluded that the E.S.A. contemplated "an on-going employer not a bankrupt one" (p.726). He stated:

> ". . . In other words, the employees continue to be entitled to collect their wages until the employer observes the provisions of s.13 (2) [now s.40(2]. In the case of a bankrupt employer, this is, of course, meaningless. It is trite law that a proof of claim can only be filed against a bankrupt estate for claims that were in existence at the date of bankruptcy; hence, the fact that by reason of the E.S.A. the employment of the claimant was not terminated is of no assistance to the claimant." (p.726 - 727).

The Malone Lynch decision might be construed to mean that employees whose statutory notice period expired before the bankruptcy have a claim in bankruptcy for termination pay, but those whose statutory notice period did not expire before the date of bankruptcy do not have a claim. An undesirable effect is that the claims for termination of more junior employees (entitled to less notice because of their fewer years of service, and likely terminated prior to more senior employees) will more frequently be recognized in a bankruptcy than similar claims from more senior employees (entitled to more notice and likely terminated closer to the date of bankruptcy).

On the principles adopted in the Malone Lynch case those employees terminated at, or close to the date of bankruptcy, may be prevented from recovering termination pay under the E.S.A. even though a claim for damages for wrongful dismissal at common law would be recognized. Unionized employees are therefore at a disadvantage because employees covered by collective agreements may be unable to bring a wrongful dismissal action.[13]

The correctness of the reasoning applied in this decision has been questioned. The author of Employment Law in Canada, Professor Innis Christie makes the following comment on the case:

> "With respect, His Lordship appears to overlook the fact that what is now s.40(7) of the Employment Standards Act, 1974, provides that where the employment of an employee is terminated without the requisite statutory notice the employer shall pay in lieu of notice. The employer's obligation is thus not one that necessarily contemplates an on-going employer. It is submitted that just as at common law the economic difficulties of an employer constitute neither cause for dismissal nor frustration of the contract of employment, so should they not under labour standards legislation, even where those difficulties result in bankruptcy". (p.422)

As noted by Christie, E.S.A. s.40(7) is an important indication that the E.S.A. does contemplate terminations prior to expiry of the notice period. Section 40(7) provides for pay in lieu of notice when the "employment of an employee is terminated contrary to this section". In such cases, termination pay is, arguably, a remedy for a breach of the E.S.A. (failing to give required notice) rather than an extension of employment. Regn. 286 s.9(4) also recognizes termination of employment prior to the completion of the proper period of notice and deems termination to have occurred on the first day of layoff.

The Malone Lynch case was decided before section 40(7), was enacted in its present form. The predecessor section and Act was much less clear than the present section 40(7) and it is therefore possible the Malone Lynch case rests on the wording of the previous Act.

Although Houlden, J. denied the claim for E.S.A. termination pay in Malone Lynch, his decision appears to recognize that a bankrupt employer may be responsible for damages for wrongful dismissal (an action based on termination of employment). In his decision, he considered the liability of the bankrupt employer for common-law "damages for termination of employment" (apart from the E.S.A.). However he concluded that no damages were suffered because the claimant was employed by the trustee for a considerable period immediately after the bankruptcy occurred.

Labour Relations Act:

If the collective agreement has termination pay requirements, or if an arbitrator 'reads into' the collective agreement the E.S.A. termination pay provisions in the event that the agreement is silent with respect to termination pay, a successor employer may be liable for the amount of termination pay which his predecessor failed to pay. However, in many cases collective agreements will not have termination pay provisions and employees therefore rely on E.S.A. provisions and the collection procedures discussed above.

Although employees may be 'terminated' within the meaning of the E.S.A., they may nonetheless continue to be employees under the collective agreement and to be entitled to recall.

Business Corporations Act

E.S.A. termination pay will not be considered to be a debt not exceeding six months' wages payable for services performed under the B.C.A. It is therefore unlikely that the employees could sue the directors for termination pay under either the Ontario or the Canada Business Corporations Acts (Mesheau v. Campbell et at. supra.)

The Construction Lien Act

Under the E.S.A. construction workers are generally not entitled to termination pay (Regn. 286, s.2)

The C.L.A. provisions protect worker claims for amounts due for services supplied to certain construction projects and do not provide for notice or pay in lieu of notice.

C) SEVERANCE PAY

The E.S.A. requires employers to pay employees who have been employed by the employer for at least 5 years severance pay if the employer terminates 50 or more employees within 6 months and the terminations are caused by the permanent discontinuance of all or part of the business of the employer at an establishment (E.S.A. s.40a). Under the E.S.A., employees entitled to severance pay must receive one week's pay for each year of employment to a maximum of twenty-six years.

If an employee has a contract or collective agreement which gives him a right to be recalled, the employee must abandon the right to be recalled in order to be paid severance pay under the E.S.A. (E.S.A. s.40a (8)(9)). Presumably, however, an employer could agree to continue to give such employees recall rights (E.S.A section 4).

Unlike termination pay which is an amount which must be paid if proper notice is not given, severance pay is intended to help compensate the employee for the loss of a job and the loss of benefits accrued as a result of length of service with an employer. Benefits derived from longer service may include recall rights, greater job status, better pension benefits, longer vacation periods and greater job security. Such benefits are not transferable to a new workplace. Severance pay helps compensate for these losses. It also gives long service workers some money to invest against such losses.

Employees' collective agreements or individual contracts of employment may also make provision for severance pay.

The issues discussed above (pages 30, 31) with respect to whether laid-off employees will be found to be terminated under the E.S.A. may arise with respect to severancepay. A recent Regulation [15] has made it clear that the definition of termination under Regulation 286 applies to termination pay only. It is not yet clear what will constitute termination for the purposes of severance pay. Once entitlement to severance pay is established, the following methods for recovering it may be available.

E.S.A. Priority and Enforcement

The E.S.A. definition of "wages" is broad enough to include severance payments required under the E.S.A. or under any contract of employment or collective agreement. Thus, the priority created by section 14 of the E.S.A. and the E.S.A. enforcement provsions apply to severance pay claims. The discussion on pages 4 to 6 therefore applies with respect to severance pay.

For the reasons set out in that discussion, the E.S.A. priority, letter of garnishee, and employment standards officers' or Referees' orders are not effective in recovering severance pay unless there is a surplus remaining after secured creditors have realized their security. Even then, employees will likely recover only a portion of thier claim.

The $2,000 limit for the wage priority under section 14 will restrict the amount of severance pay given preferred status. However, unlike other wages, the amount of severance pay which an employment standards officer can order to be paid is not restricted (under s.47(1)(c) it is not included in the $4,000 'cap').

A E.S.A. section 60 prosecution of any officer, director or agent who authorized, permitted or acquiesced in the failure of a corporate employer to pay severance pay is, as with other wages, possible but unlikely. If successful, it could result in recovery of the unpaid severance pay from (presumably solvent) individuals.

Comments made above with respect to receiver-manager liability for termination pay are also applicable to liability for severance pay.

Bankruptcy Act

Several cases have examined the wording of s.107(1)(d) of the B.A. and found that termination pay or severance pay is not "wages . . . for services rendered during three months next preceding the bankruptcy" and have therefore concluded that claims are unsecured and not preferred. (Re Hamilton Harvey Limited (1976) 21 C.B.R. 234 (B.C.S.C. in Bankruptcy), Re Lewis' Department Store Limited (1972) 17 C.B.R. 113 (Ont S.C. in Bankruptcy).

It is arguable that the Malone Lynch decision does not preclude severance claims in a bankruptcy. Under the E.S.A., the severance pay provisions do not extend an employee's employment beyond the date of actual termination. Also, the severance pay provisions were clearly intended to apply in bankruptcy situations. The Act which enacted the severance pay provisions (S.O. 1981, c.22) had a transition provision which provided that the severance pay provisions did not apply to a bankrupt or an insolvent person or to an employer whose proposal under the B.A. had been accepted by his creditors until the period after the Act received Royal Assent. In addition, severance pay is intended to help compensate the employee for the loss of a job and the loss of benefits accrued as a result of length of service with an employer. Such rights accrue during the period of service with the employer, not after the bankruptcy and it is therefore arguable that a claim exists at the date of bankruptcy.

A case decided after Malone Lynch allowed a claim for severance pay under a collective agreement. In the Hamilton Harvey Limited case (supra.), the Court approved the view that the severance pay in question was "in the nature of liquidated damages which was agreed upon in advance, as compensation for any loss that might be sustained by employees . . . in the event of the . . . suspension of the corporation, and not for wages earned." It was therefore allowed as an unsecured rather than preferred claim.

Employment Standards Act: Related Employer Provisions

Same as for hourly wages and salary (see page 19above).

Employment Standards Act: Successor Employer Provisions

The effect of section 13 of the E.S.A. is the same with respect to severance pay as it is with respect to termination pay (described above at pages 30-31). If a successor employer employs the employee, the employee's employment with the predecessor employer will be deemed to have been employment with the purchaser for severance pay purposes

Labour Relations Act:

As with other employee claims, if the business is sold to a successor employer who is bound by a collective agreement providing for severance pay, the L.R.A. may provide an effective means of collecting severance pay which is due.

However, E.S.A. section 40a(8) and (9) may create problems in some cases. The previous legislation merely allowed an employer to require waiver of recall rights. However, the new provisions deem an employee to have abandoned the right to be recalled if he or she accepts or elects to be paid severance pay under the E.S.A.

In a bankruptcy or insolvency, employee recall rights will be very important if the business is sold. Section 63 of the L.R.A. requires a successor employer bound by the predecessor's collective agreement to observe the terms of the agreement. The agreement will contain recall and seniority provisons. These provisions will generally entitle these employees to be recalled when the new employer commences operation, and to continue to benefit from the provisions of the agreement (e.g. wage rates, pension plan). If an employee claims for severance pay in a bankruptcy or receivership, will this be an election to be paid severance pay forthwith and therefore a deemed abandonment of the right to be recalled? Does it matter if the employee recovers nothing or only a small percentage of his or her severance claim - has the employee still lost recall rights?

If the filing of a severance pay claim is an election, this could mean that the job security which section 63 of the L.R.A. normally provides is seriously undermined by filing a severance pay claim. In such cases, it may be preferable for employees not to claim severance pay but for the Director to make the claim for payment into his s.40a(9) trust account. If money for severance pay has been paid into the Director's trust fund, it could give the employees more time to make an election for severance pay or recall rights.

Business Corporations Act

Like termination pay, it is unlikely that severance pay will be a debt not exceeding six months' wages payable for services performed under the B.C.A. It is therefore unlikely that the employees could sue the directors for severance pay under the B.C.A. (Mesheau v. Campbell, supra., Re Hamilton Harvey Ltd., supra.).

Construction Lien Act

Under the E.S.A., construction workers are generally not entitled to severance pay (E.S.A. s.40a(3)(e).

The C.L.A. provisions protect workers claims for amounts due for services supplied but they do not require payment of severance pay.

If, however, the contract or collective agreement provided for payment of a certain amount per hour to provide S.U.B. benefits or a benefit on termination into a trust fund, it is likely the amount could be part of a 'workers' trust fund' and collected under s.83(2). Also, if amounts for termination are calculated as amounts earned for work done by time or piece work they may be "wages" under the C.L.A. and part of the workers' lien (C.L.A. s.1(1) (26), 83(1)) or wages within the meaning of the B.A. s. 107(d), (Canadian Display and Exhibit Company Limited, (1968) 12 C.B.R. (N.S.) 180 (Ont. S.C. Reg.).

D) VACATION PAY

The E.S.A. requires an employer to give each employee a vacation with pay of at least 2 weeks upon completion of each 12 months of employment. The pay for the vacation must equal at least 4% of the wages of the employee in the 12 month period for which the vacation is given (E.S.A. s.29).

If the employee's employment ceases within a year for which the employee has not been given a vacation with pay, the employer is required to pay the employee 4% of the employee's wages. For E.S.A. purposes, the employee's employment can "cease" when the employer becomes bankrupt or insolvent.

Employees' collective agreements or individual contracts of employment may also require vacation pay although some such agreements are subject to the approval of the Director of Employment Standards (E.S.A. s.32). Vacation pay is payable on any termination pay owed (Inco Ltd. and United Steelworkers of America, (1984) 6 C.C.E.L. 263 (Ont. Div. Ct.)
Since the E.S.A. requires the payment of amounts set out in collective agreements or individual contracts if the amounts are greater than the minimums provided by the E.S.A., it is possible to use the E.S.A. procedures to collect the amounts set out in the contract or agreement. For example, in the Phoenix Paper Products Limited case,[16] the vacation pay entitlement set out in the collective agreement was greater than the minimum entitlement under the E.S.A. The Court found that the trust created by the E.S.A. s. 15 protected the amount of vacation pay which was owed to the employees under the terms of the collective agreement.

E.S.A. Trust Provision for Vacation Pay

b) Section 15 of the E.S.A. provides:

> 15. Every employer shall be deemed to hold vacation pay accruing due to an employee in trust for the employee whether or not the amount therefore has in fact been kept separate and apart by the employer and the vacation pay becomes a lien and charge upon the assets of the employer that in the ordinary course of business would be entered in books of account whether so entered or not. R.S.O. 1980, c.137, s.15.

The effectiveness of provincially created trust provisions has been examined in an Appendix to this report entitled 'The Ability of the Province to Protect Wages: The Constitutional Issues'. That paper concludes that the Ontario courts have held that the statutory trusts are constitutionally valid and enforceable.

The vacation trust provision has been considered in several recent cases.

The Phoenix Paper Products Limited case (supra.) has recently confirmed the view that, in situations involving a bankruptcy, the vacation pay "deemed" trust means that the amount of unpaid vacation pay which has accrued is held "in trust" by the employer and does not form part of a bankrupt employer's property. Since it does not form part of the bankrupt employer's property, it is not available for distribution to other creditors. This permits the unpaid vacation pay claim to have priority over the claims of all secured, preferred and unsecured creditors.

In the Windsor Packing Company, Limited case, (National Bank of Canada et al. v. Director of Employment Standards (1983) 3 P.P.S.A.C. 119) the company had defaulted on loans and two creditors named receiver-managers pursuant to the terms of a debenture, a general security agreement and other securities held by the creditors. A receiver-manager sold the company's inventory and collected some of the company's accounts receivable. The Director of Employment Standards demanded payment of vacation pay pursuant to section 15 of the E.S.A. Almost one month after the receiver-managers were named, the company was petitioned into bankruptcy by an unsecured creditor. The receiver-manager argued that the money received from the sale of assets, including money from accounts receivable and inventory should not be used to pay vacation pay because these assets had been charged with the creditors' security prior to the unpaid vacation pay accruing.

The creditors argued that the charge created by the general security agreement with respect to inventory, accounts receivable, and after-acquired property was a prior fixed and specific charge and that it was therefore not subject to the vacation pay trust for vacation pay which accrued after the general security agreement was registered.

E.S.A. Referee Kenneth Swan rejected this argument. He found that amounts accruing due as vacation pay under the E.S.A. trust provision (E.S.A. s.15) had priority over the security interest created by the general security agreement with respect to after-acquired property accounts receivable and inventory. He held that:

i) the Personal Property Security Act, R.S.O. 1980, C. 375 (P.P.S.A.) does not apply to a lien created by statute. Section 15 of the E.S.A. is such a lien and it is therefore not subject to the P.P.S.A.

ii) since the P.P.S.A. does not apply, the law applicable prior to the P.P.S.A. applies. That law would have given priority to the statutory trust with respect to after acquired property because the property subject to the trust would never become part of the employer's assets and a subsequent security interest could therefore not attach. Cases gave the statutory trust or lien priority over floating charges (Re Dairy Maid Chocolates Ltd. [1973] 1 O.R. 603 (Ont. H.C.), C.I.B.C. v. Brooker Trade Bindery Ltd., (1975) 20 C.B.R. (N.S.) 280 (Ont. S.C.)).

He noted that the general security agreement purported to confer a security interest in favour of the creditor in respect of every single identifiable and definable asset of Windsor Packing yet it also provided that Windsor Packing was permitted to carry on its business and engage employees to perform operations in respect of the business. Referee Swan concluded that the claim for vacation pay under E.S.A. s. 15 should therefore prevail over the general security agreement which was perfected prior to the accrual of the vacation pay to the extent that agreement covered after-acquired property, inventory and accounts receivable because:

(a) this is consistent with pre- P.P.S.A. law

(b) there is a presumption that no one can contract out of the provisions of a statute. In the E.S.A., section 3 expressly states this. If one were to permit a general security agreement to do this, it would be contrary to the E.S.A. and public policy. A general security agreement would be doing this "by purporting to arrange for the carrying on of the business by one corporation with assets that, in effect, belong to another" (p.152-153).

(c) employees added value to the inventory purchased by Windsor Packing against the line of credit provided by the bank "...by adding value to the animals purchased for inventory, [the employees] created an interest in those assets to which the statutory trust for vacation pay could affix" (p.154).

(d) the creditor had knowledge of the day to day affairs of the debtor and there was therefore no reason not to regard the creditor as having express notice on a weekly basis of the

> accrual of amounts of vacation pay and the establishment of a trust fund.

Referee Swan noted that, even if the vacation pay trust were not given priority over the security interest created under the general security agreement:

> ". . .it would still be necessary to assess in respect of each particular part of the collateral whether the security interest set out in the general security agreement had attached prior to the establishment of the statutory trust. As I have found above, the statutory trust accrues from day to day, or at least from week to week where wages are paid weekly, and therefore at any given time there would have been a substantial amount of accrued but unpaid vacation pay...
>
> At the point, however, when the inventories are sold and replaced by accounts receivable, no security interest could attach to those accounts receivable until they came into existence, and it would therefore be reasonable to assume that any new accounts receivable being created would be impressed with the statutory trust for vacation pay accumulated up to that time." (page 155)

Thus, even if the vacation pay trust did not have priority, when inventory (in this case cattle and meat products) became accounts receivable, the amount accrued for vacation pay would have priority with respect to the newly-created accounts receivable.

Creditors are well aware that employees will have vacation pay accruing and they could, when they take security, advise themselves of the likely extent of future accruals. Employees on the other hand, do not or are not able to negotiate their own 'security' to compete with that of moneylenders and banks - they must rely on statutory protection. Should they lose this because the employer (with full knowledge of likely future accruals) gives security on its assets to a creditor who could be informed of the likely extent of future accruals? The judicial review of this decision is scheduled to be heard by the Ontario Divisional Court, November 6 and 7, 1985 .

Effectiveness of the Vacation Pay Trust

Although there has been a line of cases which has held that provincially created deemed trusts may not be effective in bankruptcy, Ontario cases have held that Section 15 of the E.S.A. creates a valid 'deemed' trust which will be effective in receiverships and bankruptcies since it will have priority over secured claims. Although there may be some dispute as to whether or not there is a priority over certain security (e.g. the security which, in the Windsor Packing case covered inventory, accounts receivable and after-acquired property - and which may or may not properly be referred to as a fixed and specific charge) perfected before the vacation pay accrued, the most recent cases dealing with s.15 have either not made a distinction between secured creditors (Re Phoenix Paper supra) or, in the case of Windsor Packing, an express finding has been made to the effect that the vacation pay trust has priority over a prior charge with respect to after-acquired property, accounts receivable and inventory.

E) PENSION BENEFITS AND CONTRIBUTIONS

The most common types of private pension plans are the money purchase plan, the defined benefit pension plan, and the profit sharing plan.

a) Money Purchase Plan: This type of plan sets out the amount of the employee's contributions to the plan (if any) and the amount of the employer's contributions to the plan. The contributions are invested. The benefit that the employee will receive is not guaranteed and it generally cannot be determined until the employee retires. At retirement the employee's and the employer's contributions as well as the amounts earned from the investment of the contributions are used to purchase a pension for the employee. The employee's benefit will depend on the amount contributed, the return on the contributions invested and the rates available for the purchase of pensions at the date of retirement.

In the event of a bankruptcy or insolvency, the employer may be owing some of his contributions to the plan. He also may have deducted employee contributions from wages and not set aside or paid into the plan the amount notionally deducted from wages.

b) Profit Sharing Plan: A profit sharing plan is a type of money purchase plan in which the amount of the employer's contribution is made by reference to profits or out of profits.

In the event of a bankruptcy or insolvency, the employer may be owing some of his contributions to the plan. He also may have made a notional deduction of employee contributions from wages and failed to set aside or pay into the plan the amount notionally deducted.

c) Defined Benefit Pension Plan: The defined benefit plan sets the amount of the benefit which will be paid when the employee retires. This is usually fixed as a dollar amount for each year that an employee worked or as a percentage of the employee's annual earnings multiplied by the number of years of service. For example, the plan could provide that the employee's benefit will be $12 per month for each year of service at age 65 or it could provide that the benefit will be 2% multiplied by years of service multipled by his average annual earnings in his last 5 years of service.

The Ontario Pension Benefits Act, R.S.O. 1980, c.373 (the "P.B.A.") allows employers 15 years to 'fully fund' a defined benefit pension plan. A pension plan is fully funded when it has, at any particular time, assets sufficient to pay the benefits required under the terms of the plan in respect of employee service prior to that time.

The P.B.A. requires an employer to pay into the plan employee contributions within one month of receiving or deducting such contributions. The P.B.A. also requires the employer to make annual contributions to pay current service costs (the amount required to cover the cost of benefits accrued during the fiscal year), special payments to pay off the unfunded liability of the plan over 15 years and payments which may, for other reasons, be required to reduce any deficit experienced by the plan. (Regn. 746, s.2).

In the event of a bankruptcy or insolvency, employees may find that their defined benefit pension plan is not fully funded because the 15 years allowed to fully fund the plan may not have expired.

> Also, amendments may have been made to improve the original level of benefits and it may be less than 15 years since the amendments were made. Alternatively, even if 15 years have elapsed since the plan was set up and amendments made, the plan may not be fully funded because the employer may have failed to make the required payments or to pay employee contributions into the plan.

Thus, in the event of a bankruptcy or insolvency, an employer may owe employer and employee contributions to either a money purchase plan or a defined benefit plan. In the case of a defined benefit plan, additional amounts may be required to provide the level of benefits set out in the pension plan.

The deemed trust provisions of the P.B.A. provide protection for the employee and employer contributions which are due. In addition, if the plan is terminated or wound up, the deemed trust provisions protect certain employer contributions for amounts which have accrued but which otherwise would not yet be due.

The deemed trust provisions do not, however, provide protection for amounts which would be required to fully fund a defined benefit plan. The P.B.A. offers some protection for these amounts by establishing a Pension Benefits Guarantee Fund (the "Fund") and by providing a method for winding up the plan and allocating and distributing plan assets and liabilities. In some cases, the successor employer provisions of the L.R.A. may also protect pension benefits.

a) Trust Provisions

Where an employer receives employee contributions or withholds money by payroll deduction or otherwise as employee contributions, the employer is deemed to hold that money in trust for the employee. (P.B.A. s.23(1), (2)).

Likewise, an employer who is required by a pension plan to contribute to the plan is deemed to hold in trust for the members of the plan an amount of money equal to all the money the employer is required to pay into the pension plan to meet the current service cost and the special payments that are due under the pension plan and have not been paid (P.B.A. s.23(4)).

Current service cost means the amount that the employer and the employees are required to pay into the plan in a fiscal year of the plan to cover the cost of benefits accrued during the year (P.B.A. s.1(ab), Regn. 746 s.2(3)(a)).

Special payments are the annual amounts sufficient to liquidate the initial unfunded liability of the plan over a period of 15 years and the annual amounts sufficient to liquidate certain other deficits experienced by the plan over a period of 5 years (Regn. 746, s.2(3)(b),(c)).

In addition, if a plan is terminated or wound up, the "deemed" trust of section 23 applies to an amount of money equal to the current service costs and special payments which accrued to the date of termination or wind up (but otherwise would not yet be due) (P.B.A. s.21(2)(9), s.23(4)).
The administrator or trustee of the pension plan has a lien and charge on the assets of the employer in the amount which is deemed to be held in trust as employees' contributions (P.B.A. s.23(3)) and as the employer's required contributions (P.B.A. s.23(5)).

The trusts which are 'deemed' to exist apply whether or not the money mentioned has been kept separate and apart from other money. (P.B.A. s.23(6)).

Effectiveness of the Trust Provisions

If the line of Ontario cases which has held provincially created deemed trusts to be effective in both bankruptcy and receivership is followed, these deemed trust provisions in the P.B.A. should provide effective protection for employee and employer contributions due to money purchase pension plans at the date of wind up. They will also provide effective protection for employee contributions and employer contributions which are due (or, if the plan is terminated, have accrued) to defined benefit pension plans. These contributions should have priority over the claims of secured creditors, although it is likely they will rank after certain prior fixed and specific security interests.

The deemed trust provisions of the P.B.A. will not, however, be adequate to protect the benefits which a defined benefit pension plan has contracted to provide employees. Since the "deemed" trust only applies to amounts which are due or which have accrued by the date of termination or wind up, the amounts which would be required to fully fund the liabilities of the plan are not covered by the "deemed" trust provisions. For example, if a defined benefit plan has only been in existence for 5 years, only 1/3 of the special payments required to fully fund the plan would be due or accrued and therefore 'protected' by the deemed trust at the date of termination or wind up.

Although the deemed trust provisions should be effective, it is unclear how they will be enforced in the event of employer insolvency. It would appear that the administrator of the pension plan, the employees, any union representing the employees or even the Pension Benefits Commission itself could make the deemed trust claim in a bankruptcy or receivership in order to recover for the plan the funds deemed to be held in trust.

Wind Up of the Plan and Distribution

There are three main categories of employees for pension purposes

i) those who have been employed by the employer for ten years (or who have been members of the plan for 10 years) and who have attained the age of 45 (referred to as "P.B.A.-vested" employees) The benefits for these employees will be guaranteed by the Fund to the extent of $1,000/month.

ii) those who have vested rights under the terms of their pension plan (referred to as "plan-vested" employees). For example, if the plan provides for vesting after 10 years service regardless of age, employees in this category could be younger than 45 years of age and have plan-vested rights if they had 10 years service.

iii) those employees who are neither P.B.A.-vested nor plan vested (referred to as "non-vested" employees).

Section 28(a) of the P.B.A. provides that the Pension Commission of Ontario may declare that a defined benefit pension plan is wound up in whole or in part for the purposes of the P.B.A. on such date as the Commission in its discretion considers appropriate, where:

> "(a) the employer providing the plan is bankrupt within the meaning of the Bankruptcy Act (Canada);
>
> (b) the plan has been terminated in whole or in part and the employer has failed to meet the funding requirements prescribed;
>
> (c) the plan has been terminated in whole or in part and the Commission is of the opinion that because of his insolvency the employer will not be able to meet the funding obligations prescribed by regulation;
>
> (d) the Commission has reason to believe that the amount of payments that the Fund may be required to guarantee may be expected to increase unreasonably if the plan is not wound up; or
>
> (e) such other event as is prescribed by regulation occurs."
>
> (P.B.A. s. 28)

If the pension plan is wound up, all benefits provided under the pension plan are treated as fully vested (Regn. 746, s.14(6)(c)). Thus, even non-vested employees will be entitled to benefit if there are sufficient assets in the pension plan to fully provide for P.B.A.-vested and plan-vested benefits (no money from the plan can revert to the employer unless the plan provides for such reversion and provision has been made for payment of all benefits under the plan for all three categories of employees, Regn. 746, s.14(6)).

If, however, there are insufficient assets in the plan to provide for P.B.A.-vested benefits, and plan-vested benefits, the assets of the pension plan will be used to first provide for P.B.A. and plan-vested benefits. If the assets of the plan are not sufficient to fully provide for P.B.A. and plan-vested benefits, the non-vested employees will receive nothing.

A determination will be made of the extent to which the plan assets will be able to provide the benefits which the terms of the pension plan provide for P.B.A.-vested and plan- vested employees.

The Fund will ensure that there are sufficient additional assets to provide 100% of the P.B.A.-vested benefits (and certain other benefits guaranteed by the Fund). However, plan-vested employees (whose full benefits are not guaranteed by the Fund) will receive only the level of benefits which can be funded by the assets in the pension plan (or which at least equal the value of the contributions the employee made to the plan).

Thus, to use a somewhat simplistic example, a pension plan may be 40% funded to provide P.B.A.-vested and plan-vested benefits. The Fund will ensure funding to provide 100% of the benefits guaranteed by the Fund (including benefits for P.B.A.-vested employees) and 40% funding for those employees with only plan-vested rights.

Effectiveness of the P.B.A. Wind-Up and Distribution Provisions

The P.B.A. wind-up and distribution provisions ensure that assets in a pension plan do not revert to the employer if plan benefits - including benefits for non-vested employees - have not been provided for. The method of allocation also means that assets are available to fund plan-vested benefits - even if P.B.A.-vested benefits are not fully funded. Recourse can be made to the Fund before the plan assets available to provide plan-vested benefits are depleted.

However, if a plan is not fully funded, only employees whose benefits are guaranteed by the Fund will get 100% of their benefits. Those employees with plan-vested (but not guaranteed) benefits will only receive benefits to the extent that they can be provided by the assets in the pension plan. Non-vested employees will receive no benefits (other than benefits equalling their own contributions) if there are insufficient assets to first provide for P.B.A. and plan-vested employees.

Pension Benefits Guarantee Fund

Section 30 of the P.B.A. establishes the Fund to guarantee certain payments of benefits where a defined benefit pension plan is wound up. The Fund is not available to any employees unless the pension plan is wound up under section 28(2) of the P.B.A.

The Fund guarantees pension benefits:

a) to employees who have been employed by the employer for ten years (or who have been members of the plan for 10 years) and who have attained the age of 45; and

b) which the plan is paying to a retired member, his survivor, estate or designated beneficiary; and

c) to former plan members who had 10 years service with the employer (or 10 years membership in the plan) and were at least 45 years of age before they terminated their employment; and
d) which at least equal the value of the contributions the employee made to the plan. (P.B.A. s.31)

The maximum pension benefit guaranteed by the Fund for any member is $1000 per month (Regn. 746, s.29).

Effectiveness of the Pension Benefits Guarantee Fund:

A number of employees cannot benefit from the Fund. It does not guarantee funds to:

i) employees who belong to multi-employer plans (e.g. many employees in the construction industry) (Regn. 746, s.32(2)), or money purchase plans (P.B.A., s. 30(2)) or other plans which are exempted by regulation (e.g. Public Service Superannuation Fund, Teachers' Superannuation Fund and funds of certain municipal corporations (Regn. 746, s.32(1)).

ii) employees who are less than 45 years of age or to employees who are more than 45 years of age but have less than 10 years service with the employer (or less than 10 years membership in the plan). However, as indicated above, the method for allocating assets is such that these employees should receive a percentage of their plan-vested benefits. Employees whose rights are neither guaranteed or plan-vested may not be entitled to any benefits unless there are sufficient assets to fully provide for P.B.A.-vested and plan-vested benefits, or unless they are employed by a successor employer who purchases the business.

iii) employees whose plans have been in existence less than 3 years. Any increase to a pension benefit that became effective within three years before the date of termination or wind up of the plan is not guaranteed (P.B.A. s.32(2)).

In addition, the Fund does not guarantee pension benefits in excess of $1,000 per month.

Statutory Lien

The Commission has a lien and charge upon the assets of the employer in an amount equal to the amount of any payment out of the Fund plus interest (P.B.A. s.33).

Employer's Obligation to Pay

In addition to the employee and employer contributions which are protected by the deemed trust provisions of the P.B.A., the employer will, if the plan is wound up, be required to pay the amount by which the value of benefits guaranteed by the Fund exceed the value of the assets in the plan (P.B.A. s.32). The Commission's statutory lien should protect this amount.

However, in addition to amounts paid with respect to benefits guaranteed by the Fund, the employer is required to pay the amount by which the value of plan-vested benefits exceeds the value of the assets in the plan (P.B.A., s.32). This amount is not protected by the 'deemed trust' provisions of the P.B.A. (except to the extent of the employee or employer contributions prescribed by the P.B.A.), nor is it protected by any lien or charge created under the P.B.A. (except to the extent it is guaranteed e.g. for the value of past employee contributions. This amount is likely only an unsecured claim in bankruptcy or receivership. It is therefore unlikely it will be recovered in full. Thus, in these cases, plan-vested employees are unlikely to receive the full benefits to which they were entitled under their plan.

P.B.A. Successor Employer Provisions:

Where an employer who is bound by a pension plan sells all or part of his business, section 29 of the P.B.A. provides that service for pension purposes will include service with both that employer and the successor employer. This could be important in cases where the successor employer establishes or continues a plan since it could affect the vesting of rights and the eligibility for benefits under the successor's plan.

Labour Relations Act - Successor Employer Provisions

Pension plans or provisions providing for certain pension benefits will frequently form part of a collective agreement. Even if the pension plan is physically separate from the formal collective agreement, it will be part of the collective agreement if, for example, it is incorporated into it by some reference in the formal collective agreement (Brown, D.J.M. and Beatty, David M., Canadian Labour Arbitration at para .4:1200).

If the pension plan is part of the collective agreement, and the predecessor employer is bound by the collective agreement when the business is sold to a successor employer, the successor employer is bound by the pension plan to the same extent as the predecessor employer (see pages 8 to 20 above for a discussion of the arbitration, successor employer and related employer provisions of the Labour Relations Act (the "L.R.A.").

Thus, if the terms of the pension plan incorporated into the argreement are such that the pension plan cannot be changed, or terminated without the approval of the union, the union would have a grievance if the successor did not continue the plan and make the contributions or provide the benefits according to the terms of the plan.

Also, the collective agreement may set out certain benefit levels which are to be maintained-without incorporating the actual pension plan into the collective agreement. In such a case, the successor employer who is bound by the agreement must provide those benefits and the service with the predecessor employer would likely be included in the service to be recognized by the successor (P.B.A. s. 29 and L.R.A. s. 63). Since the benefit levels and not the particular plan forms part of the collective agreement, the employer would be able to choose whether to continue the predecessor's plan or establish a new plan to provide the benefits set out in the agreement.

Effectiveness of the L.R.A. Provisions

The L.R.A. provisions could be effective, in some cases, in requiring a successor employer to make contributions to a pension plan, provide certain levels of benefits to employees or pay amounts which a predecessor employer has failed to pay. The effectiveness of the provisions will, to a large extent, depend on the wording of the collective agreement itself - the extent to which it makes provision for pension benefits and the extent to which it incorporates the terms of the pension plan into the collective agreement. Also, where the plan is incorporated, the wording of the plan itself - including wording with respect to how the plan can be terminated - will be important.

The provisions of the P.B.A. generally do not recognize the union's role or interest in the operation or administration of a pension plan.

Although both the union and the employer may have a vital interest in any decision about whether or when a plan will be wound up, the P.B.A. contemplates the unilateral termination of a plan by the employer (P.B.A. s.28 (2)(b)(c)) and the recognition of such a termination by the Commission. The P.B.A. does not give employees or the union representing plan members the right of object to the Commission's decision to wind-up the plan. Only the employer has this right.

Directors' Liability

Section 39(1) of the P.B.A. provides that any person who contravenes the Act or the regulations is guilty of an offence and on conviction is liable to a fine of not less than $200 and not more than $10,000.

Section 39(2) provides that an employer convicted of an offence under section 39(1) shall pay to the insurer, trustee or administrator of the pension plan all amounts that the employer has wrongfully failed to pay as required by the P.B.A. and regulations.

Section 39(3) provides:

> (3) Where a corporation is guilty of an offence under this act, an officer, director or agent of the corporation who directed, authorized, assented to, acquiesced in, or participated in, the commission of the offence is a party to and guilty of the offence and is liable on conviction to the punishment provided for the offence whether or not the corporation has been prosecuted or convicted.

Since Section 39(3) makes the director of the corporate employer liable to the "punishment" for the offence where the corporation is guilty of the offence, it is unclear whether the directors are liable to the fine provided by s.39(1) or to both the fine provided by s.39(1) and the payment of amounts the employer has wrongfully failed to pay in accordance with s.39(2).

It has been suggested that the obligation to pay amounts due may not be found to be a "punishment" since it is already an obligation on the employer under the P.B.A. (Rupert H. Chartrand, 'Employee Relationships' 1983 C.B.A. Seminar Business Law: Commercial Insolvency).

On the other hand, it can be argued that the word "fine" would have been used instead of "punishment" if it were intended that directors' liability would be restricted to a fine. Given that the word "punishment" is broader than "fine", it could be held to include payments due. Also, the employer's obligation to pay is repeated in the penalty section of the P.B.A. and can therefore be interpreted as providing a punishment. The better view of section 39(3) would therefore appear to be that the directors' liability may extend not only to the fine but also to all amounts the employer wrongfully failed to pay.

Like section 60 of the E.S.A., the provisions of the P.B.A. require the officer, director, or agent to have authorized or acquiesced in the non-payment of amounts required to be paid under the P.B.A. However, unlike the E.S.A., the onus of proving such authorization or acquiescence is on the prosecution rather than the officer, director or agent. It may therefore be more difficult to obtain a conviction under this section.

Summary:

a) the deducted employee contributions and the employer contributions which are due or accrued are likely effectively protected by the trust provisions of the P.B.A. (except with respect to creditors with certain prior fixed and specific security)

b) benefits under defined benefit plans are not entirely protected except for those individuals whose benefits are guaranteed by the Pension Benefits Guarantee Fund. Amounts required to be paid so that the value of the assets in the plan equal the value of plan-vested (but not guaranteed) pension benefits are not protected trust or secured claims under the P.B.A. (except to the extent that they are employer or employee contributions prescribed by the P.B.A.) Such amounts are therefore unlikely to be fully recovered in a bankruptcy or receivership and the benefits received by plan-vested employees will be reduced accordingly.

c) if a defined benefit plan is wound-up and it does not have sufficient assets to pay P.B.A.-vested and plan-vested employees' benefits in full, non-vested employees will receive no benefits (other than benefits equalling the value of their own contributions).

d) amounts that the Commission pays out of the Fund and attempts to collect from the employer will be secured by a lien and charge upon the assets of the employer.

e) it is possible that officers, directors or agents of a corporate employer which has failed to make required payments or contributions could be liable for amounts which the corporation has failed to pay if they are prosecuted. However, (unlike E.S.A. section 60), the onus of proof of direction, authorization or acquiescence in non-payment is on the prosecution.

f) For employees involved in a bankruptcy or receivership some protection may arise if the business is sold and the purchaser employs the employees of the insolvent employer. In such cases, P.B.A. s.29 may deem the employees' employment not to have been terminated for certain purposes.

The greatest protection may exist in cases where employees have a collective agreement which is binding on a successor employer and which includes either provisions for pension benefits or the pension plan itself. The successor employer provisions of the L.R.A. will mean that such provisions bind the successor employer as they did the predecessor. In such cases, the successor employer may be required to assume the predecessor's liabilities under the pension plan.

F) CONTRIBUTIONS TO GOVERNMENT PLANS

In the event of a bankruptcy or insolvency, it may be discovered that the employer owes the contributions which the employer is, by law, required to make to government-administered plans such as workers' compensation, C.P.P., and U.I.C. The employer may also have deducted income tax and employee contributions to O.H.I.P., C.P.P., and U.I.C. and have failed to remit these amounts. In addition, the employer may have contracted to pay the employee's O.H.I.P. premiums, but failed to do so.

i) WORKERS' COMPENSATION ACT

The Workers' Compensation Act, R.S.O. c539 (the"W.C.A.") provides that the Board may issue a certificate setting out the amount of unpaid assessment and file this with any county or district Court (or, if the amount unpaid does not exceed $1,000, with any Small Claims Court). When the certificate is filed, it becomes an order of the Court and may be enforced as such (W.C.A. s.116).

The Board may also have the amount which is unpaid entered upon the collector's roll as if it were taxes due and it may be collected in the same manner as taxes (W.C.A. s.117).

In certain circumstances, 'owners' under the Construction Lien Act may be personally liable to pay assessments to the Board.

Section 120 of the W.C.A. provides for priority of the assessment when distribution of property under certain provincial acts is being made. The Section provides:

> 120...(1) There shall be included among the debts that, under the Assignments and Preferences Act, the Trustee Act, and the Corporations Act, are, in the distribution of the property, in the case of an assignment or death or in the distribution of the assets of a company being wound up, under the said Acts respectively, to be paid in priority to all other debts, the amount of any assessment or compensation the liability wherefore accrued before the date of the assignment or death or before the date of the commencement of the winding up, and the said Acts have effect accordingly.

The section also provides for a "first lien" on the employer's property to the extent of unpaid assessments or special assessments as follows:

> (3) The amount set forth in a certificate of the Board filed pursuant to section 116 is a first lien upon all the property, real or personal, of the employer used in or in connection with the industry with respect to which the employer is assessed, subject only to municipal taxes, and the amount levied under execution upon any such judgment to the extent of the amount due upon such execution shall forthwith be paid to the Board.
>
> (4) The lien mentioned in subsection (3) is effective only where notice of the lien has been filed by way of writ of fieri facias in the office of the sheriff of the county or district in which the property against which the lien applied is situated and, where land affected is registered under the Land Titles Act, a copy of such Writ has been transmitted by mail or delivered by the sheriff to the proper land registrar. R.S.O. 1980, c.539, s.120.

Section 107(1)(h) of the B.A. makes the indebtedness of the bankrupt under the W.C.A. a preferred claim.

In the Deloitte Haskins and Sells Limited case (decision of the Supreme Court of Canada June 13, 1985), six of seven judges of the Supreme Court held that the fact that the Workers' Compensation Act is specifically referred to in section 107(1)(h) of the B.A. meant that the federal government has legislated its priority in bankruptcy, and the provincial government therefore cannot legislate to change that priority. Thus,the claims for workers' compensation assessments under the Alberta legislation were held to be preferred rather than secured in a bankruptcy.

Effectiveness of the W.C.A Provision

In a bankruptcy it is likely that, even though the lien provision of section 120 attempts to create a "first lien", it will not entitle the W.C.B. to rank as a secured creditor. Instead, the W.C.B. claim will likely simply rank as a preferred creditor with the priority set out in section 107(1)(h) B.A. (Deloitte Haskins and Sells Limited and The Workers' Compensation Board, (supra.)).

In a receivership, the W.C.A. lien may not have priority over prior fixed and specific charges. In the Crown Trust Co. et al case, (1975) 55 O.L.R. (3d) 498 (Ont. H.C.)), Mr. Justice Houlden found that a prior mortgage and a floating charge which crystallized before the W.C.A. lien came into existence had priority over the W.C.A. lien since the W.C.A. lien attached to the employer's interest in the property rather than attaching to the property itself. However, the W.C.A. lien would likely have priority over subsequent security and assets secured by a floating charge.

Any employee covered by the W.C.A. is entitled to compensation, regardless of whether or not his or her employer has paid the W.C.B. assessments owing. Thus, if W.C.A. assessments are not collected, other employer contributors to the W.C.B. bear the cost of the ineffective mechanism for recovering W.C.B. assessments.

ii) O.H.I.P.

Under the Health Insurance Act, R.S.O. 1980, c.197 (H.I.A.), any employer with 15 or more employees and any employer whose employees are designated by the General Manager as a 'mandatory group' must deduct employee O.H.I.P. premiums from the employee's remuneration (the "H.I.A." s.16).

The H.I.A. contains provisions which provide for a court to fine an employer who fails to remit premiums a minimum of $2,000 and to order an employer or a director or officer of a corporation to pay premiums which the employer failed to remit (H.I.A. s.47). This provision is not usually used in cases where there is an insolvent or bankrupt employer.

In addition, the H.I.A. contains provisions making directors of the corporate employer personally liable for the premiums the employer failed to remit if they concurred in the failure to remit (H.I.A. s.47), or if the employer

(a) goes into liquidation:

(b) is ordered to be wound up;

(c) makes an authorized assignment under the the Bankruptcy Act (Canada);

(d) has a receiving order under the Bankruptcy Act (Canada) made against it; or

(e) ceases to carry on its undertakings (H.I.A. s.48).

Section 18 of the H.I.A. provides that any person who receives or withholds any amount for the purpose of paying a premium is deemed to have received and to be holding the amount in trust for the Treasurer of Ontario and all accounts of such premium amounts are to be kept separate and apart from that person's own money.

Effectiveness of the H.I.A. provisions

Since the H.I.A. trust provision for employee premiums does not deem trust money to have been kept separate and apart, the trust provision will not be effective in a receivership or bankruptcy if the employer has in fact failed to keep the money separate and apart.

In a bankruptcy, the claim for O.H.I.P. premiums which are deducted from employee wages but not kept separate and apart are preferred claims under s.107(1)(j) of the B.A.. In a receivership, claims for O.H.I.P. premiums which have been deducted are unsecured Crown claims. If the employer has deducted the O.H.I.P. premium from the employee's wages, this discharges the employee's obligation to pay the premium. If this amount is not recovered in an insolvency, the other members of the plan and the government bear the cost.

However, if the employer has agreed to pay the employee's O.H.I.P. premiums, (as opposed to merely deducted them from the employee's wages) and has then failed to pay them, the employee continues to be obliged to pay the premium. Arguably, O.H.I.P. legally could sue the employee to recover the amounts the employer has failed to pay. However, O.H.I.P. has not done so. Nonetheless, the employee will be covered by O.H.I.P. Thus, other plan members and the taxpayer absorb the cost of the premiums the employer failed to pay.

Amounts which have been deducted but not remitted or kept separate and appart may be recovered from the directors of the corporation. A number of civil proceedings have been commenced against directors under H.I.A. section 48 and there frequently has been recovery using that provision of the H.I.A.

iii) CANADA PENSION PLAN

The Canada Pension Plan, R.S.C. 1970, c. C-5 (the "C.P.P.") requires that both employer and employee contributions be made to the plan (C.P.P. sections 9 and 22(1)). Contributions are collected by the Department of National Revenue and the collection procedures used are similar to existing tax collection procedures (C.P.P section 24(2)).

Employer Contributions: In a bankruptcy, employer contributions rank as preferred claims under s.107(j) of the B.A. They rank after all secured claims and after certain other preferred claims (such as wage claims). In a receivership, employer contributions are unsecured claims.

Employee Contributions:

The C.P.P. deems any amount which has been deducted from an employee's remuneration to be money held in trust for Her Majesty.

Section 24(3) and (4) of the C.P.P. provide:

> 24(3) Where an employer has deducted an amount from the remuneration of an employee as or on account of any contribution required to be made by the employee but has not remitted such amount to the Receiver General, the employer shall keep such amount separate and apart from his own moneys and shall be deemed to hold the amount so deducted in trust for Her Majesty.

> (4) In the event of any liquidation, assignment or bankruptcy of an employer, an amount equal to the amount that by subsection (3) is deemed to be held in trust for Her Majesty shall be deemed to be separate from and form no part of the estate in liquidation, assignment or bankruptcy, whether or not that amount has in fact been kept separate and apart from the employer's own moneys or from the assets of the estate.

This provision was considered by the Supreme Court of Canada in Dauphin Plains Credit Union Ltd v. Xyloid Industries Ltd. et al.(1980) 108 D.L.R. (3d) 257. In that case, the debtor defaulted under certain debentures and a receiver was appointed at the creditor's request by the court. The receiver sold the company's assets. The secured creditor and the Department of National Revenue claimed the proceeds. The Department of National Revenue claimed amounts for employer and employee contributions to the C.P.P. and U.I. as well as income tax source deductions. The employee tax, C.P.P. and U.I. contributions for the period prior to the receivership had been deducted from the wages paid to employees but the sums deducted were not set apart. At the time they were deducted, the company did not have sufficient funds to set the amounts aside.

The Court held that the trust for C.P.P. employee contributions was valid in the receivership. Although it did not give C.P.P. and U.I. employee contributions priority over a prior fixed and specific charge, they were given priority over the debenture's (prior) floating charge. Since the floating charge crystallized after the deductions were made, the Court held that the C.P.P. and U.I. contributions which had been deducted from employees' wages were to be paid from the proceeds realized by the receiver out of the assets subject to the floating charge.

The Dauphin Plains case was followed by the Ontario Court of Appeal in Phoenix Paper (supra) and by the B.C. Court of Appeal in A.G. of Canada v. Samson Belair Ltd. (1985) 17 D.L.R. (4th) 544 (leave to appeal this decision to the Supreme Court of Canada was refused June 13, 1985).

If a corporate employer fails to deduct or remit the employee's contributions, the directors of the corporation can be found to be jointly and severally liable to pay Her Majesty the amount of the contribution which the employer failed to deduct or remit plus interest plus penalties. (C.P.P. section 22.1)

Effectiveness of the C.P.P. Provisions

The C.P.P. trust provisions for employee contributions should be effective against all creditors except creditors with certain prior fixed and specific charges. The priority should exist in both a receivership and a bankruptcy. Employer contributions, however, will only have the 'preferred' status given by s.107(1)(j) of the B.A. in a bankruptcy. In a receivership, they be unsecured claims. A prosecution of the directors may, in some cases, be effective for recovering deficiencies.

iv) UNEMPLOYMENT INSURANCE

Employer Contributions: In a bankruptcy, employer contributions rank as preferred claims under section 107(h) of the B.A. They rank after all secured claims and after certain other preferred claims such as wage claims. In a receivership, they are unsecured claims.

Employee Contributions: Every employer is required to deduct and remit U.I. employee contributions.

The U.I. Act has deemed trust provisions and director liability provisions similar to those in the C.P.P.

Section 71 (2), (3) creates the deemed trust with respect to employee contributions which have been deducted for the purposes of U.I. It provides:

> 71.(2) Where an employer has deducted an amount from the remuneration of an insured person as or on account of any employee's premium required to be made by the insured person but has not remitted such amount to the Receiver General, the employer shall keep such amount separate and apart from his own monies and shall be deemed to hold the amount so deducted in trust for Her Majesty.
>
> (3) In the event of any liquidation, assignment or bankruptcy of an employer, an amount equal to the amount that by subsection (2) is deemed to be held in trust for Her Majesty shall be deemed to be separate from and form no part of the estate in liquidation, assignment or bankruptcy, whether or not that amount has in fact been kept separate and apart from the employer's own monies or from the assets of the estate.

These were the provisions referred to by the Supreme Court of Canada in the Dauphin Plains case (supra).The Supreme Court held that the deemed trust for U.I. employee contributions therefore had priority over a secured creditor with a subsequent fixed and specific charge and a floating charge which did not crystallize before the claim for deductions arose.

However, a recent decision of the B.C. Court of Appeal appears not to have followed the Dauphin Plains case. The majority decision of the British Columbia Court of Appeal in A.G. Canada v. Samson Belair Ltd. (supra.) found that, in view of the specific reference to U.I. statutes in B.A. 107(h), section 107 of the B.A. should prevail over the deemed trust provisions of the U.I. Act. Thus, claims for employee contributions were found to be preferred rather than trust claims. The decision appears to be contrary to the Dauphin Plains decision and inconsistent with the language of section 71(3) of the U.I. Act which specifically deals with bankruptcy.

In any event, the arguments raised in Samson Belair clearly pertain only to bankruptcy situations. In non-bankruptcy situations the trust should be effective so that U.I. employees' contributions are paid before the claims of secured creditors.

Directors' Liability

Section 68.1 of the U.I. Act deals with the liability of directors where a corporate employer fails to deduct or remit employee contributions. It provides:

> "68.1 (1) Where an employer who fails to deduct or remit an amount as and when required under subsection 68 (1) is a corporation, the persons who were the directors of the corporation at the time when the failure occurred are jointly and severally liable, together with the corporation, to pay to Her Majesty that amount and any interest or penalties relating thereto.
>
> (2) Subsections 227.1(2) to (7) of the Income Tax Act apply, with such modifications as the circumstances require, in respect of a director of a corporation referred to in subsection (1).
>
> (3) The provisions of this Part respecting the assessment of an employer for an amount payable by him under this Act and respecting the rights and obligations of an employer so assessed apply in respect of a director of a corporation in respect of

> an amount payable by the director under subsection (1) in the same manner and to the same extent as if the director were the employer referred to in those provisions".

Effectiveness of the U.I. Provisions

In a receivership, the U.I. trust provisions for employee contributions should be effective against all creditors except creditors with certain prior fixed and specific charges. It is somewhat unclear whether this priority would exist in a bankruptcy. However, the better view would appear to be that the trust provision is effective in a bankruptcy. Employer contributions will have the 'preferred' status given by s.107(1)(h) B.A. in a bankruptcy. However, in a receivership, the claims for employer contributions are unsecured.

A prosecution against a director might, in some cases, be effective for recovering deficiencies.

v) INCOME TAX ACT

The deemed trust provisions of the Income Tax Act, S.C. 1970-71-72, c.63 (the "I.T.A.") provide that:

> 227 (4) Every person who deducts or withholds any amount under this Act shall be deemed to hold the amount so deducted or withheld in trust for Her Majesty.
>
> (5) All amounts deducted or withheld by a person under this Act shall be kept separate and apart from his own moneys and in the event of any liquidation, assignment or bankruptcy the said amounts shall remain apart and form no part of the estate in liquidation, assignment or bankruptcy.

If the source deductions for employee income tax are actually made and the money for such deductions is kept separate and apart from other funds, there will be a trust fund which should effectively protect the income tax deducted. However, if only a 'notional' deduction of income tax is made, the trust provisions for tax are not likely to be effective. In Dauphin Plains, the Court found that any notional deductions made for employee tax contributions will not take priority over the interests of a secured creditor unless the words of the statute not only deem a trust to exist but also deem it to be separate and apart from the estate.

In Dauphin Plains, the employer had reduced employee wages by the amount required as employee deductions for income tax. However, the employer had not set this amount of money separate and apart from company funds. In the receivership, the secured creditor was therefore given priority and the Department of National Revenue was unable to collect the money which had been deducted from employee wages as tax deductions by the employer.

Theoretically, Revenue Canada may be able to refuse to credit the employee with the taxes 'notionally' deducted and require the employee to pay taxes on the net wages received by the employee (The Queen v. Coopers and Lybrand Limited et al. (the 'Venus Electric' case), 80 DTC 6281 (Fed. C.A.)). However, at the present time, as a matter of policy, Revenue Canada credits the employee with the amount notionally deducted and attempts to recover from the employer.

These income tax source deductions often represent significant amounts. Revenue Canada has estimated that the government has, in the last five years had to write off more than $100 million in taxes that now defunct companies deducted from employees' pay cheques.[17]

In response to this, the 1985 federal Budget proposed the following:

> (59) That with respect to amounts required under the Act to be deducted or withheld and remitted by a person after May 23, 1985,
>
> (a) amounts deducted or withheld by the person be deemed to be held in trust by that person for Her Majesty separate and apart from that person's other assets, and
>
> (b) Her Majesty have a charge in priority over other claims or rights on the property of the person for the amount for which the person is liable in respect of all such amounts that he failed to remit during the 90 day period preceding the earlier of a liquidation, assignment, receivership or bankruptcy of or by the person and the day on which he is assessed under the Act for that amount, and

> for the purposes of this subparagraph the property of a person includes all his assets whether subject to liens, charges or encumbrances or held free and clear.

This would create a trust for employee tax deductions, even if the amount notionally deducted has not, in fact, been deducted and kept apart from other assets. It would also create a charge on the property of the employer for other employer tax liabilities. Since trust property is not the property of the employer, the proposed I.T.A. trust would rank with other trust claims in priority to claims of secured creditors. The proposed non-trust charge would likely rank after trust claims (such as vacation pay, construction workers' wages, private pension contributions and U.I. and C.P.P. employee contribution claims) but before preferred claims (such as certain employee wage and salary claims).

Director's Liability

Directors may be held liable for the failure of a corporation to deduct, withhold or remit employee income tax contributions (I.T.A., s.227.1)

Effectiveness of I.T.A. Provisions

The existing trust provision for income tax deducted from employees' wages will not be effective unless the money from such deductions has been kept separate and apart from the employer's other funds. If it has not been kept separate and apart, it will probably rank as an unsecured claim in a receivership and as preferred claim under B.A. s.107(1)(h) in a bankruptcy.

A prosecution against a director will be successful if the director failed to exercise the degree of care, diligence and skill to prevent the failure to deduct or remit employee taxes that a reasonably prudent person would have exercised in comparable circumstances (James V. Barnett v. The Minister of National Revenue 85 D.T.C. 619 (Tax Ct.)).

OTHER BENEFITS

Many collective agreements and a number of individual contracts of employment provide additional benefits. For example, employers may be required to pay O.H.I.P. premiums, contribute to a supplementary unemployment benefit fund, contribute to plans insuring against death or disability or to plans covering employee medical or dental expenses.

In the event of a bankruptcy or insolvency, employees may find that these and other contributions have not been made by the employer.

Generally, such contributions and benefits will not be protected by statutory trust or lien provisions. Contributions to most benefit funds will not be "wages" for the purposes of the E.S.A. and will therefore not be entitled to the E.S.A. priority. However, if the contributions are payable to a construction workers' trust fund they may have the protection of the C.L.A. If calculated on a per hour basis they may also be 'compensation for services rendered' and recoverable in bankruptcy as a preferred claim under s.107(1)(d) (Re Canadian Display and Exhibit Company Limited, (1968) 12 C.B.R. N.S. 180). If calculated in this manner they may also be debts for services under the B.C.A. and recoverable as such.

If a successor employer is bound by a collective agreement under which liabilities for such benefits has arisen, the amounts may, in some cases, be recoverable under the successor employer provisions of the L.R.A.

SUMMARY

Under existing Ontario law, certain wages protected by statutory deemed trust provisions such as vacation pay, construction workers' wages, employee and employer contributions to private pension plans, and employee deductions for C.P.P. and U.I., are effectively protected by statutory provisions which 'deem' the amounts owing or deducted to be held in trust and kept separate and apart from the employer's other assets. Such amounts are available to the beneficiaries of the trust (the Crown or the employees) but not to other creditors. The trust has priority over floating charges, and security taken after the employer's assets were impressed with the trust. The trust also has priority over prior charges covering inventory, accounts receivable and after-acquired property according to the Windsor Packing decision, supra.

The successor employer provisions of the L.R.A. may also effectively protect some employees against wage and benefit loss. However, that protection is somewhat limited since the provisions apply only if the insolvent employer is bound by a collective agreement and its business is sold in accordance with the L.R.A. In addition, the effectiveness of the provisions in protecting employees' claims where a receiver has been appointed may depend on whether the receiver is court-appointed or privately-appointed.

All other employee wage claims—non-construction hourly wages or salary, pay in lieu of notice, severance pay, plan-vested (but not guaranteed) pension benefits, other contractual benefits - rank after the claims of secured creditors. In some cases such claims will be preferred and paid only if sufficient surplus remains after the secured creditors realize on their security. In other cases, such claims will be unsecured and paid only if sufficient surplus remains after all security is realized and preferred claims are paid. In many cases there is no surplus to pay the preferred claims in full; in almost all cases there no surplus to pay the unsecured claims in full.

Claims for non-construction hourly wages or salary over $500, damages for wrongful dismissal, termination pay (if the claim is allowed), severance pay and claims for certain employee benefits are unsecured claims in a bankruptcy, and are very rarely recovered in full. In a receivership, non construction hourly wages or salary, termination pay and severance pay are more often recovered because they are preferred claims. However, the portion of the the total wage claim exceeding $2,000, as well as claims which are not "wages" under the E.S.A. (e.g. employer contributions to certain benefit plans, and, probably, damages for wrongful dismissal) will be unsecured and therefore almost never recovered in full.

The priority of such claims may be different in a bankruptcy than in a receivership. Similarly, the employee's entitlement to termination pay may be different in a bankruptcy than it is in a receivership. Thus, wage recovery may depend on the choice of the creditors between putting the insolvent employer into bankruptcy or into receivership.

The likelihood of recovering employer and employee contributions to government-administered plans varies and depends on the particular statutory provisions whether and the creditors choose to put the insolvent employer into bankruptcy rather than into receivership.

Ontario's existing wage protection legislation provides a number of possible wage claims and recovery mechanisms. However, many of these mechanisms are ineffective. Also, many inconsistencies in wage recovery arise as a result of technical legal distinctions between bankruptcy and receivership, 'lay-off' and 'termination', private receiverships and court-approved receiverships, and the presence or absence of a collective agreement covering the employees. These inconsistencies can lead to employees in apparently similar circumstances recovering different amounts if their employer is insolvent.

The cost of ineffective wage recovery mechanisms is borne by the individual employee or, in the case of taxes or contributions to government plans, the contributors to the plans or the taxpayer.

The views and opinions expressed in this paper are those of the author personally and not necessarily those of the Ministry of Labour or the Employment Standards Branch. The author is, however, indebted to Ms. Susan Rowland and Mr. John Hill, Interpretation Specialists with the Employment Standards Branch, Mr. Harold Rolph, Legal Services, Ontario Ministry of Labour and Ms. Lynda Ellis, Assistant Superintendent of Valuations, Ontario Pension Commission, for their helpful comments.

FOOTNOTES

1. Sunnylea Foods Limited, [1981] O.L.R.B. Rep. Nov. 1640; Daynes Health Care Limited [1985] O.L.R.B. Rep. Mar. 387; Metro Investment Corporation [1985] O.L.R.B. Rep. May 703; Termarg Food Services Limited, [1985] O.L.R.B. Rep Mar. 516.

2. Re A.J. Coleman and Sons Ltd. and Retail Wholesale and Department Store Union, Local 597 (1984) 15 D.L.R. (4th) 32 (Nfld. C.A.)—leave to appeal to the Supreme Court of Canada refused December 17, 1984. Uncle Ben's Industries Ltd. and Prince George Breweries Ltd. and Canadian Union of United Brewery, Flour, Cereal, Soft Drik and Distillery Workers, Local 300 [1972] 2 Can. L.R.B.R. 126 (B.C.L.R.B.).

3. Price Waterhouse Limited, and The Maritime Life Assurance Company (Chateau Gardens) [1983] O.L.R.B. Rep. 1184.

4. Maritime Life Assurance Company v. Chateau Gardens (Hanover) Inc., (1983) 43 O.R. (2d) 754 (Ont. H.C.).

5. Followed by the B.C. Labour Relations Board in Caledonia Inns Ltd. 85 C.L.L.C. 14,306.

6. Christie, Employment Law in Canada (Toronto , 1980) at page 416); Addison v. M.Loeb, Ltd. (1984) 45 O.R. (2d) 399 (Ont.H.C.).

7. Reid v. The Explosives Company, Limited, (1887), 19 Q.B.D. 264 (English C.A.); Christie, Employment Law in Canada (Toronto, (1980) at pages 416 to 423; Bennett, Receiverships, (Toronto, 1985) page 248.

8. Engel v. Clarkson Company Limited, (1982) 44 C.B.R. (N.S.) 25. (But see Re Kemp Products Limited, (1978) 27 C.B.R. (N.S) 1 for argument that dismissal must be by employer rather than receiver-manager).

9. Mesheau v. Campbell et al., (1982) 39 O.R. (2d) 702 (Ont. C.A.); Lewis's Department Store Ltd. et al., (1972), 17 C.B.R. (N.S.) 113 (Ont. Reg.).

10. Hess, Paul, 'Employment Standards in Ontario', Employment Law, Special Lectures of the Law Society of Upper Canada 1976.

11. Prince Arthur Motor Inn, Decision 1613, June 15, 1981 (Aggarwal); Rene Sauve Limited, Decision 1207, Mar. 1, 1982 (D. Fraser).

12. Rachamin's Enterpreses Ltd, Decision 955, Feb. 27, 1981 (D. Adamson) McLaughlin Chevrolet - Oldsmobile Ltd., Decision 780, May 9, 1980 (M. Gorsky)

13. See, for example, Bourne v. Otis Elevator Co. Ltd. (1984) 4 C.C.E.L. 1 (Ont. H.C. Southey J.).

14. Re Lewis's Department Stores Ltd. (supra.footnote 9); Re Hamilton Harvey Ltd., (1975) 21 C.B.R. (N.S.) 234; Dahmer Steel Limited; Thorne Riddell Inc. v. Kreutzkamp (decision of Mr. Justice Sutherland rendered June 11, 1985 and Edward Kenning v. Dahmer Steel Limited, (decision of Mr. Justice Eberle rendered May 23, 1985).

15. Regulation 120/85.

16. Re Phoenix Paper Products Limited, (1983) 44 O.R. (2d) 225 (Ont. C.A.)

17. The Honourable Perrin Beatty (Revenue Minister), Globe and Mail, November 28,

Appendix A

1. Apprenticeship and Tradesmen's Qualification Act, R.S.O. 1980, c.24
2. Business Corporations Act, S.O. 1982, c.4
3. Co-operative Corporations, R.S.O. 1980, c.91
4. Corporations Act, R.S.O. 1980, c.95
5. Credit Unions and Caisses Populaires Act, R.S.O. 1980, c.102
6. Government Contracts Hours and Wages Act, R.S.O. 1980, c.190
7. Industrial Standards Act, R.S.O. 1980, c.216
8. Loan and Trust Corporations Act, R.S.O. 1980, c.249
9. Master and Servant Act, R.S.O. 1980, c.257
10. Mercantile Law Amendment Act, R.S.O. 1980, c.265
11. Mining Act, R.S.O. 1980, c.268
12. Ministry of Transportation and Communication Creditors Payment Acts, R.S.O. 1980, c.290
13. Wages Act, R.S.O. 1980, c.52
14. Woodmen's Lien For Wages Act, R.S.O. 1980, c.537

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3. Business Corporations Act, S.O. 1982, c.4 5.

4. Canada Business Corporations Act, S.C. 1974-75-76, c.33 6.

5. Construction Lien Act, S.O. 1983, c.6 7.

6. Employment Standards Act, R.S.O. 1980, c.137 11.

7. Labour Relations Act, R.S.O. 1980, c.228 15.

8. Pension Benefits Act, R.S.O. 1980, c.373 17.

Bank Act, S.C. 1980, c.40

Loans to certain borrowers and security

178. (1) A bank may lend money and make advances,

(*a*) to any wholesale or retail purchaser or shipper of, or dealer in, products of agriculture, products of the forest, products of the quarry and mine, products of the sea, lakes and rivers or goods, wares and merchandise, manufactured or otherwise, on the security of such products or goods, wares and merchandise and of goods, wares and merchandise used in or procured for the packing of such products or goods, wares and merchandise,

(*b*) to any person engaged in business as a manufacturer, on the security of goods, wares and merchandise manufactured or produced by him or procured for such manufacture or production and of goods, wares and merchandise used in or procured for the packing of goods, wares and merchandise so manufactured or produced,

(*c*) to any farmer, on the security of crops growing or produced on the farm or on the security of agricultural equipment or agricultural implements,

(*d*) to any farmer

(i) for the purchase of seed grain or seed potatoes, on the security of the seed grain or the seed potatoes and any crop to be grown therefrom, and

(ii) for the purchase of fertilizer or pesticide on the security of the fertilizer or pesticide and any crop to be grown from land on which, in the same season, the fertilizer or pesticide is to be used,

(*e*) to any farmer or to any person engaged in livestock raising, on the security of feed or of livestock, but security taken under this paragraph is not effective in respect of any livestock that, at the time the security is taken, by any statutory law that is then in force, is exempt from seizure under writs of execution and the farmer or other person engaged in livestock raising is prevented from giving as security for money lent to him,

(*f*) to any farmer for the purchase of agricultural implements, on the security of such agricultural implements,

(*g*) to any farmer for the purchase or installation of agricultural equipment or a farm electric system, on the security of such agricultural equipment or farm electric system,

(*h*) to any farmer for

(i) the repair or overhaul of an agricultural implement or of agricultural equipment,

(ii) the alteration or improvement of a farm electric system,

(iii) the erection or construction of fencing or works for drainage on a farm,

(iv) the construction, repair or alteration of or making of additions to any building or structure on a farm, and

(v) any works for the improvement or development of a farm for which a farm improvement loan as defined in the *Farm Improvement Loans Act* may be made,

on the security of agricultural equipment or agricultural implements, but security taken under this paragraph is not effective in respect of agricultural equipment or agricultural implements that, at the time security is taken, by any statutory law that is then in force, are exempt from seizure under writs of execution and the farmer is prevented from giving as security for money lent to him,

(*i*) to any fisherman, on the security of fishing vessels, fishing equipment and supplies or products of the sea, lakes and rivers, but security taken under this paragraph is not effective in respect of any such property that, at the time the security is taken, by any statutory law then in force, is exempt from seizure under writs of execution and the fisherman is prevented from giving as security for money lent to him, and

(*j*) to any forestry producer on the security of fertilizer, pesticide, forestry equipment, forestry implements or products of the forest, but security taken under this paragraph is not effective in respect of any such property that, at the time the security is taken, by any statutory law then in force, is exempt from seizure under writs of execution and the forestry producer is prevented from giving as security for money lent to him,

and the security may be given by signature and delivery to the bank by or on behalf of the person giving the security of a document in the form set out in the appropriate schedule or in a form to the like effect.

Rights and powers vested by delivery of document

178.(2) Delivery of a document giving security on property to a bank under the authority of this section vests in the bank in respect of the property therein described

(*a*) of which the person giving security is the owner at the time of the delivery of the document, or

(*b*) of which that person becomes the owner at any time thereafter before the release of the security by the bank, whether or not the property is in existence at the time of the delivery,

the following rights and powers, namely,•••

Priority of wages and money owing for perishable agricultural products

(6) Notwithstanding subsection (2) and notwithstanding that a notice of intention by a person giving security on property under this section has been registered pursuant to this section, where, under the *Bankruptcy Act*, a receiving order is made against, or an assignment is made by, such person,

(*a*) claims for wages, salaries or other remuneration owing in respect of the period of three months next preceding the making of such order or assignment, to employees of such person employed in connection with the business or farm in respect of which the property covered by the security was held or acquired by such person, and • • •

have priority to the rights of the bank in a security given to the bank under this section, in the order in which they are mentioned herein, and if the bank takes possession or in any way disposes of the property covered by the security, the bank is liable for such claims to the extent of the net amount realized on the disposition of such property, after deducting the cost of realization, and the bank is subrogated in and to all the rights of the claimants to the extent of the amounts paid to them by the bank.

PART IV

PROPERTY OF THE BANKRUPT

Property of bankrupt

47. The property of a bankrupt divisible among his creditors shall not comprise

(*a*) property held by the bankrupt in trust for any other person,

Scheme of Distribution

Priority of claims

107. (1) Subject to the rights of secured creditors, the proceeds realized from the property of a bankrupt shall be applied in priority of payment as follows:

(*a*) in the case of a deceased bankrupt, the reasonable funeral and testamentary expenses incurred by the legal personal representative of the deceased bankrupt;

(*b*) the costs of administration, in the following order,

(i) the expenses and fees of the trustee,

(ii) legal costs;

(*c*) the levy payable under section 118;

(*d*) wages, salaries, commissions or compensation of any clerk, servant, travelling salesman, labourer or workman for services rendered during three months next preceding the bankruptcy to the extent of five hundred dollars in each case; together with in the case of a travelling salesman, disbursements properly incurred by him in and about the bankrupt's business, to the extent of an additional three hundred dollars in each case, during the same period; and for the purposes of this paragraph commissions payable when goods are shipped, delivered or paid for, if shipped, delivered or paid for within the three-month period, shall be deemed to have been earned therein;

(*e*) municipal taxes assessed or levied against the bankrupt within two years next preceding his bankruptcy and that do not constitute a preferential lien or charge against the real property of the bankrupt, but not exceeding the value of the interest of the bankrupt in the property in respect of which the taxes were imposed as declared by the trustee;

(*f*) the landlord for arrears of rent for a period of three months next preceding the bankruptcy and accelerated rent for a period not exceeding three months following the bankruptcy if entitled thereto under the lease, but the total amount so payable shall not exceed the realization from the property on the premises under lease, and any payment made on account of accelerated rent shall be credited against the amount payable by the trustee for occupation rent;

(*g*) the fees and costs referred to in subsection 50(2) but only to the extent of the realization from the property exigible thereunder;

(*h*) all indebtedness of the bankrupt under any Workmen's Compensation Act, under any Unemployment Insurance Act, under any provision of the *Income Tax Act* or the *Income War Tax Act* creating an obligation to pay to Her Majesty amounts that have been deducted or withheld, *pari passu*;

(*i*) claims resulting from injuries to employees of the bankrupt to which the provisions of any Workmen's Compensation Act do not apply, but only to the extent of moneys received from persons or companies guaranteeing the bankrupt against damages resulting from such injuries;

(*j*) claims of the Crown not previously mentioned in this section, in right of Canada or of any province, *pari passu* notwithstanding any statutory preference to the contrary.

Payment as funds available

(2) Subject to the retention of such sums as may be necessary for the costs of administration or otherwise, payment in accordance with subsection (1) shall be made as soon as funds are available for the purpose.

Balance of claim

(3) A creditor whose rights are restricted by this section is entitled to rank as an unsecured creditor for any balance of claim due him. R.S., c. 14, s. 95.

Directors' liability to employees for wages

131.—(1) The directors of a corporation are jointly and severally liable to the employees of the corporation for all debts not exceeding six months' wages that become payable while they are directors for services performed for the corporation and for the vacation pay accrued while they are directors for not more than twelve months under the *Employment Standards Act*, and the regulations thereunder, or under any collective agreement made by the corporation.

R.S.O. 1980, c. 137

Limitation

(2) A director is liable under subsection (1) only if,

(*a*) he is sued while he is a director or within six months after he ceases to be a director; and

(*b*) the action against the director is commenced within six months after the debts became payable, and

(i) the corporation is sued in the action against the director and execution against the corporation is returned unsatisfied in whole or in part, or

(ii) before or after the action is commenced the corporation goes into liquidation, is ordered to be wound up or makes an authorized assignment under the *Bankruptcy Act* (Canada), or a receiving order under the *Bankruptcy Act* (Canada) is made against it, and in any such case, the claim for the debts is proved.

R.S.C. 1970, c. B-4

Idem

(3) Where execution referred to in clause (2) (*b*) has issued, the amount recoverable from a director is the amount remaining unsatisfied after execution.

Rights of director who pays debt

(4) Where a director pays a debt under subsection (1) that is proved in liquidation and dissolution or bankruptcy proceedings, he is entitled to any preference that the employee would have been entitled to, and where a judgment has been obtained he is entitled to an assignment of the judgment.

Idem

(5) A director who has satisfied a claim under this section is entitled to contribution from the other directors who were liable for the claim. R.S.O. 1980, c. 54, s. 137, ***amended***.

Canada Business Corporations Act, S.C.1974-75-76, c.33

Liability of directors for wages

114. (1) Directors of a corporation are jointly and severally liable to employees of the corporation for all debts not exceeding six months wages payable to each such employee for services performed for the corporation while they are such directors respectively.

Conditions precedent to liability

(2) A director is not liable under subsection (1) unless

(*a*) the corporation has been sued for the debt within six months after it has become due and execution has been returned unsatisfied in whole or in part;

(*b*) the corporation has commenced liquidation and dissolution proceedings or has been dissolved and a claim for the debt has been proved within six months after the earlier of the date of commencement of the liquidation and dissolution proceedings and the date of dissolution; or

(*c*) the corporation has made an assignment or a receiving order has been made against it under the *Bankruptcy Act* and a claim for the debt has been proved within six months after the date of the assignment or receiving order.

Limitation

(3) A director is not liable under this section unless he is sued for a debt referred to in subsection (1) while he is a director or within two years after he has ceased to be a director.

Amount due after execution

(4) Where execution referred to in paragraph (2)(*a*) has issued, the amount recoverable from a director is the amount remaining unsatisfied after execution.

Subrogation of director

(5) Where a director pays a debt referred to in subsection (1) that is proved in liquidation and dissolution or bankruptcy proceedings, he is entitled to any preference that the employee would have been entitled to, and where a judgment has been obtained he is entitled to an assignment of the judgment.

Contribution

(6) A director who has satisfied a claim under this section is entitled to contribution from the other directors who were liable for the claim.

Contractor's and subcontractor's trust amounts received a trust

8.—(1) All amounts,

(a) owing to a contractor or subcontractor, whether or not due or payable; or

(b) received by a contractor or subcontractor,

on account of the contract or subcontract price of an improvement constitute a trust fund for the benefit of the subcontractors and other persons who have supplied services or materials to the improvement who are owed amounts by the contractor or subcontractor.

Obligations as trustee

(2) The contractor or subcontractor is the trustee of the trust fund created by subsection (1) and he shall not appropriate or convert any part of the fund to his own use or to any use inconsistent with the trust until all subcontractors and other persons who supply services or materials to the improvement are paid all amounts related to the improvement owed to them by him.

Liability for breach of trust by corporation

13.—(1) In addition to the persons who are otherwise liable in an action for breach of trust under this Part,

(a) every director or officer of a corporation; and

(b) any person, including an employee or agent of the corporation, who has effective control of a corporation or its relevant activities,

who assents to, or acquiesces in, conduct that he knows or reasonably ought to know amounts to breach of trust by the corporation is liable for the breach of trust.

Effective control of corporation

(2) The question of whether a person has effective control of a corporation or its relevant activities is one of fact and in determining this the court may disregard the form of any transaction and the separate corporate existence of any participant.

Joint and several liability

(3) Where more than one person is found liable or has admitted liability for a particular breach of trust under this Part, those persons are jointly and severally liable.

Contribution

(4) A person who is found liable, or who has admitted liability, for a particular breach of a trust under this Part is entitled to recover contribution from any other person also liable for the breach in such amount as will result in equal contribution by all parties liable for the breach unless the court considers such apportionment would not be fair and, in that case, the court may direct such contribution or indemnity as the court considers appropriate in the circumstances.

PART III

THE LIEN

Creation of lien

14.—(1) A person who supplies services or materials to an improvement for an owner, contractor or subcontractor, has a lien upon the interest of the owner in the premises improved for the price of those services or materials.

No lien for interest

(2) No person is entitled to a lien for any interest on the amount owed to him in respect of the services or materials that have been supplied by him, but nothing in this subsection affects any right that he may otherwise have to recover that interest.

When lien arises

15. A person's lien arises and takes effect when he first supplies his services or materials to the improvement.

PART IV

HOLDBACKS

Basic holdback

22.—(1) Each payer upon a contract or subcontract under which a lien may arise shall retain a holdback equal to 10 per cent of the price of the services or materials as they are actually supplied under the contract or subcontract until all liens that may be claimed against the holdback have expired as provided in Part V, or have been satisfied, discharged or provided for under section 44 (payment into court).

Separate holdback for finishing work

(2) Where the contract has been certified or declared to be substantially performed but services or materials remain to be supplied to complete the contract, the payer upon the contract, or a subcontract, under which a lien may arise shall retain, from the date certified or declared to be the date of substantial performance of the contract, a separate holdback equal to 10 per cent of the price of the remaining services or materials as they are actually supplied under the contract or subcontract, until all liens that may be claimed against the holdback have expired as provided in Part V, or have been satisfied, discharged or provided for under section 44.

When obligation to retain applies

(3) The obligation to retain the holdbacks under subsections (1) and (2) applies irrespective of whether the contract or subcontract provides for partial payments or payment on completion.

Personal liability of owner

23.—(1) An owner is personally liable to those lien claimants who have valid liens against his interest in the premises to the extent of the holdbacks that he is required to retain under this Part.

How determined

(2) The personal liability of an owner under subsection (1) may only be determined in an action under this Act.

PART V

EXPIRY, PRESERVATION AND PERFECTION OF LIENS

Expiry of liens

31.—(1) Unless preserved under section 34, the liens arising from the supply of services or materials to an improvement expire as provided in this section. • • •

Liens of other persons

(3) Subject to subsection (4), the lien of any other person,

(a) for services or materials supplied to an improvement on or before the date certified or declared to be the date of the substantial performance of the contract, expires at the conclusion of the forty-five day period next following the occurrence of the earliest of,

(i) the date on which a copy of the certificate or declaration of the substantial performance of the contract is published, as provided in section 32, and

(ii) the date on which he last supplies services or materials to the improvement, and

(iii) the date a subcontract is certified to be completed under section 33, where the services or materials were supplied under or in respect of that subcontract; and

(b) for services or materials supplied to the improvement where there is no certification or declaration of the substantial performance of the contract, or for services or materials supplied to the improvement after the date certified or declared to be the date of the substantial performance of the contract, expires at the conclusion of the forty-five day period next following the occurrence of the earlier of,

(i) the date on which he last supplied services or materials to the improvement, and

(ii) the date a subcontract is certified to be completed under section 33, where the services or materials were supplied under or in respect of that subcontract.

How lien preserved

34.—(1) A lien may be preserved during the supplying of services or materials or at any time before it expires,

(a) where the lien attaches to the premises, by the registration in the proper land registry office of a claim for lien on the title of the premises in accordance with this Part; and

(b) where the lien does not attach to the premises, by giving to the owner a copy of the claim for lien together with the affidavit of verification required by subsection (6).

Worker's priority

83.—(1) The lien of a worker has priority over the lien of any other person belonging to the same class to the extent of the amount of forty regular-time working days' wages.

Workers' trust fund

(2) Where monetary supplementary benefits are payable to a workers' trust fund instead of to a worker, the trustee of the workers' trust fund is subrogated to the rights of the worker under this Act with respect to those benefits.

Device to defeat workers' priority void

(3) Every device to defeat the priority given to workers by this section is void.

Priorities on insolvency

87.—(1) Where a payer becomes insolvent, the trust fund of which that payer is trustee shall be distributed so that priority over all others is given to a beneficiary of that trust who has proved a lien and a beneficiary of a trust created by section 8 that is derived from that trust, who has proved a lien.

Idem

(2) Priority in the distribution of trust funds among those who have proved liens shall be in accordance with the respective priorities of their liens as set out in this Part.

Idem

(3) The remaining trust funds shall be distributed among the beneficiaries of that trust and the beneficiaries of trusts created by section 8 that are derived from that trust, whose liens have not been proved, in accordance with the respective priorities to which those liens would have been entitled as set out in this Part, had those liens been proved.

CHAPTER 137

Employment Standards Act

INTERPRETATION

Interpretation

1. In this Act,

(*p*) "wages" means any monetary remuneration payable by an employer to an employee under the terms of a contract of employment, oral or written, express or implied, any payment to be made by an employer to an employee under this Act, and any allowances for room or board as prescribed in the regulations or under an agreement or arrangement therefor but does not include,

(i) tips and other gratuities,

(ii) any sums paid as gifts or bonuses that are dependent on the discretion of the employer and are not related to hours, production or efficiency,

(iii) travelling allowances or expenses,

(iv) contributions made by an employer to a fund, plan or arrangement to which Part X of this Act applies;

Waiver, etc., to be null and void

3. Subject to section 4, no employer, employee, employers' organization or employees' organization shall contract out of or waive an employment standard and any such contracting out or waiver is null and void. R.S.O. 1980, c. 137, s. 3.

Employment standard deemed minimum

4.—(1) An employment standard shall be deemed a minimum requirement only.

Greater benefit to prevail

(2) A right, benefit, term or condition of employment under a contract, oral or written, express or implied, or under any other Act or any schedule, order or regulation made thereunder that provides in favour of an employee a higher remuneration in money, a greater right or benefit or lesser hours of work than the requirement imposed by an employment standard shall prevail over an employment standard. R.S.O. 1980, c. 137, s. 4.

Provisions of collective agreements
R.S.O. 1980, c. 228

5.—(1) Where terms or conditions of employment in a collective agreement as defined in the *Labour Relations Act* confer a higher remuneration in money or a greater right or benefit for an employee respecting holidays than the provisions of Part VII, the terms or conditions of employment shall prevail.

Terms and conditions that are not in collective agreements

(2) Where the Director finds that terms or conditions of employment in a contract of employment oral or written, express or implied, that are not in a collective agreement confer a higher remuneration in money or a greater right or benefit for an employee respecting holidays than the provisions of Part VII, the terms or conditions of employment shall prevail. R.S.O. 1980, c. 137, s. 5.

PART II

GENERAL PROVISIONS

Payment of wages

7.—(1) An employer shall pay to an employee all wages to which an employee is entitled under,

(*a*) an employment standard; or

(*b*) a right, benefit, term or condition of employment under a contract of employment, oral or written, express or implied, that prevails over an employment standard,

in cash or by cheque.

Related activities, etc., may be treated as one employer

12.—(1) Where before or after this Act comes into force associated or related activities, businesses, trades or undertakings are or were carried on by or through more than one corporation, individual, firm, syndicate or association, or any combination thereof, under common control or direction, and a person is or was an employee of such corporations, individuals, firms, syndicates or associations, or any combination thereof, an employment standards officer may treat the corporations, individuals, firms, syndicates or associations as one employer for the purposes of this Act.

Individual liability

(2) The corporations, individuals, firms, syndicates or associations treated as one employer shall be individually liable for any contravention of this Act and the regulations. R.S.O. 1980, c. 137, s. 12.

Interpretation

13.—(1) In this section,

(*a*) "business" includes an activity, trade or undertaking, or a part or parts thereof;

(*b*) "sells" includes leases, transfers or any other manner of disposition and "sale" has a corresponding meaning.

Continuity of employment

(2) Where an employer sells his business to a purchaser who employs an employee of the employer, the employment of the employee shall not be terminated by the sale, and the period of employment of the employee with the employer shall be deemed to have been employment with the purchaser for the purposes of Parts VII, VIII, XI and XII.

Part XII to be complied with

(3) Where an employer sells his business to a purchaser who does not employ an employee of the employer, the employer shall comply with Part XII. R.S.O. 1980, c. 137, s. 13.

Priority of claims

R.S.C. 1970, c. B-4

14. Notwithstanding the provisions of any other Act and except upon a distribution made by a trustee under the *Bankruptcy Act* (Canada), wages shall have priority to the claims or rights and be paid in priority to the claims or rights, including the claims or rights of the Crown, of all preferred, ordinary or general creditors of the employer to the extent of $2,000 for each employee. R.S.O. 1980, c. 137, s. 14.

Vacation pay deemed to be held in trust

15. Every employer shall be deemed to hold vacation pay accruing due to an employee in trust for the employee whether or not the amount therefor has in fact been kept separate and apart by the employer and the vacation pay becomes a lien and charge upon the assets of the employer that in the ordinary course of business would be entered in books of account whether so entered or not. R.S.O. 1980, c. 137, s. 15.

PART X

BENEFIT PLANS

Application

34.—(1) This Part applies to a fund, plan or arrangement provided, furnished or offered or to be provided, furnished or offered by an employer to his employees,

(a) under a term or condition of employment; or

(b) in which an employee may elect to participate or not and to which the employer contributes or does not contribute,

that directly or indirectly provides benefits to his employees, their beneficiaries, survivors or dependants, whether payable periodically or not, for superannuation, retirement, unemployment, income replacement, death, disability, sickness, accident, or medical, hospital, nursing or dental expenses, or other similar benefits or benefits under a deferred profit sharing plan in which employees participate in profits of the employer where the profits accumulated under the plan are permitted to be withdrawn or distributed upon death or retirement or upon contingencies other than death or retirement.

Offence

59.—(1) Every person who contravenes any provision of this Act or the regulations or a decision, requirement or order made under this Act is guilty of an offence and on conviction is liable to a fine of not more than $10,000 or to imprisonment for a term of not more than six months, or to both.

Order for payment

(2) Where an employer is convicted of an offence under subsection (1), the provincial offences court making the conviction shall, in addition to any other penalty, assess the amount unpaid in respect of an employee or employees and shall order the employer to pay the amount so assessed to the Director who shall collect and distribute to the employee or employees the amount ordered to be paid.

Enforcement of order

(3) An order for payment under subsection (2) may be filed by the Director in a court of competent jurisdiction and thereupon the order shall be deemed to be an order of that court for the purposes of enforcement. R.S.O. 1980, c. 137, s. 59.

Officers, etc., liable

60.—(1) Where a corporation contravenes any provision of this Act or the regulations, an officer, director or agent of the corporation or a person purporting to act in any such capacity who authorizes, permits or acquiesces in the contravention is a party to and guilty of the offence and is liable on conviction to the penalty provided for the offence whether or not the corporation has been prosecuted or convicted.

Onus of proof

(2) In determining whether for the purposes of subsection (1) an officer, director or agent of the corporation or a person purporting to act in any such capacity authorized, permitted or acquiesced in the contravention of any provision of this Act or the regulations, it shall be for the officer, director or agent or person purporting to act in any such capacity to prove that he did not authorize, permit or acquiesce in the contravention.

Additional penalty

(3) Where an officer, director or agent of the corporation or a person purporting to act in any such capacity is convicted of an offence under subsection (1), the provincial offences court making the conviction may, in addition to any other penalty, assess the amount unpaid by the corporation in respect of the employee and shall order the officer, director or agent to pay the amount so assessed to the Director who shall collect and distribute to the employee the amount ordered to be paid.

No prosecution without consent

(4) No prosecution under this section shall be instituted without the consent of the Director and the production of a consent purporting to be signed by the Director is admissible in evidence as *prima facie* proof of his consent. R.S.O. 1980, c. 137, s. 60.

CHAPTER 228

Labour Relations Act

1.—(4) Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate. Idem

Duty of respondents

(5) Where, in an application made pursuant to subsection (4), it is alleged that more than one corporation, individual, firm, syndicate or association or any combination thereof are or were under common control or direction, the respondents to the application shall adduce at the hearing all facts within their knowledge that are material to the allegation. R.S.O. 1980, c. 228, s. 1.

44.

Enforcement of arbitration decisions

(11) Where a party, employer, trade union or employee has failed to comply with any of the terms of the decision of an arbitrator or arbitration board, any party, employer, trade union or employee affected by the decision may file in the office of the Registrar of the Supreme Court a copy of the decision, exclusive of the reasons therefor, in the prescribed form, whereupon the decision shall be entered in the same way as a judgment or order of that court and is enforceable as such. R.S.O. 1980, c. 228, s. 44 (11); 1984, c. 34, s. 1.

Interpretation

63.—(1) In this section,

(*a*) "business" includes a part or parts thereof;

(*b*) "sells" includes leases, transfers and any other manner of disposition, and "sold" and "sale" have corresponding meanings.

Successor employer

(2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if he had been a

party thereto and, where an employer sells his business while an application for certification or termination of bargaining rights to which he is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if he were named as the employer in the application.

(3) Where an employer on behalf of whose employees a trade union or council of trade unions, as the case may be, has been certified as bargaining agent or has given or is entitled to give notice under section 14 or 53, sells his business, the trade union, or council of trade unions continues, until the Board otherwise declares, to be the bargaining agent for the employees of the person to whom the business was sold in the like bargaining unit in that business, and the trade union or council of trade unions is entitled to give to the person to whom the business was sold a written notice of its desire to bargain with a view to making a collective agreement or the renewal, with or without modifications, of the agreement then in operation and such notice has the same effect as a notice under section 14 or 53, as the case requires.

Power of Board to determine whether sale

(12) Where, on any application under this section or in any other proceeding before the Board, a question arises as to whether a business has been sold by one employer to another, the Board shall determine the question and its decision thereon is final and conclusive for the purposes of this Act.

Duty of respondents

(13) Where, on an application under this section, a trade union alleges that the sale of a business has occurred, the respondents to the application shall adduce at the hearing all facts within their knowledge that are material to the allegation. R.S.O. 1980, c. 228, s. 63.

CHAPTER 373

Pension Benefits Act

Termination or winding up

21 (2) Upon the termination or winding up of a registered pension plan, the employer of employees covered by the pension plan shall pay to the administrator, insurer or trustee of the pension plan,

(a) an amount equal to,

(i) the current service cost, and

(ii) the special payments prescribed by the regulations,

that have accrued to and including the date of the termination or winding up but, under the terms of the pension plan or the regulations, are not due on that date; and

(b) all other payments that, by the terms of the pension plan or the regulations, are due from the employer to the pension plan but have not been paid at the date of the termination or winding up.

23.—(1) Where an employer receives money from an employee under an arrangement that the employer will pay the money into a pension plan as the employee's contribution to the pension plan, the employer shall be deemed to hold the money in trust for the employee until the employer pays the money into the pension plan.

Trust money for employee

(2) For the purposes of subsection (1), money withheld by an employer, whether by payroll deduction or otherwise, from moneys payable to an employee shall be deemed to be money received by the employer from the employee.

Money deemed to be received

(3) The administrator or trustee of the pension plan has a lien and charge upon the assets of the employer in an amount equal to the amount that is deemed to be held in trust under subsection (1).

Employee's lien

Trust money for plan members

(4) An employer who is required by a pension plan to contribute to the pension plan shall be deemed to hold in trust for the members of the pension plan an amount of money equal to the total of,

(a) all moneys that the employer is required to pay into the pension plan to meet,

(i) the current service cost, and

(ii) the special payments prescribed by the regulations,

that are due under the pension plan or the regulations and have not been paid into the pension plan; and

(b) where the pension plan is terminated or wound up, any other money that the employer is liable to pay under clause 21 (2) (a).

Members' lien

(5) The administrator or trustee of the pension plan has a lien and charge upon the assets of the employer in an amount equal to the amount that is deemed to be held in trust under subsection (4).

Application of subss. (1, 4)

(6) Subsections (1) and (4) apply whether or not the moneys mentioned in those subsections are kept separate and apart from other money. 1983, c. 2, s. 3.

Continuation of benefits under successor employer

29.—(1) Where an employer who is bound by or is a party to a pension plan sells, assigns or otherwise disposes of all or part of his business or undertaking or all or part of the assets of his business or undertaking, and,

(*a*) in conjunction therewith, an employee of the employer becomes an employee of the person acquiring such business, undertaking or assets, in this section called the successor employer; and

(*b*) the successor employer does not assume responsibility for the accrued pension benefits of the employer's pension plan,

the employee referred to in clause (*a*) continues to be entitled to the benefits provided under the terms of the plan in respect of his service in Ontario or a designated province without further accrual.

Re-employment deemed not a termination

(2) Where a transaction described in subsection (1) has taken place, irrespective of whether the successor employer has or has not assumed responsibility for the accrued pension benefits of the employer's pension plan, for the purposes of the employer's plan, the employment or membership in the employer's plan of an employee referred to in clause (1) (*a*) shall be deemed not to have been terminated by reason of the transaction.

Service deemed continuous

(3) Where a transaction described in subsection (1) has taken place, irrespective of whether the successor employer has or has not assumed responsibility for the accrued pension benefits of the employer's pension plan, for the purpose of,

(*a*) determining whether an employee is entitled to a deferred life annuity under a pension plan of the employer or successor employer; or

(*b*) determining completed service with respect to any eligibility condition of a successor employer's pension plan,

the service of the employee shall be deemed to include his service with both the employer and the successor employer without any break in service notwithstanding the change of employers referred to in clause (1) (*a*). R.S.O. 1980, c. 373, s. 29.

Fund established

30.—(1) There is established a fund to be known as the Pension Benefits Guarantee Fund which shall be administered by the Commission. R.S.O. 1980, c. 373, s. 30 (1).

Purpose

(2) The purpose of the Fund is to guarantee payment of the pension benefits set out in subsection 31 (1) where a defined benefit pension plan is wound up under subsection 28 (2) subject to such limits and qualifications as are set out in this Act and the regulations. R.S.O. 1980, c. 373, s. 30 (2); 1983, c. 2, s. 6.

Advances or loans to Fund

(3) If, at any time, the amount standing to the credit of the Fund is insufficient for the purpose of making payments for claims under this Act, the Lieutenant Governor in Council may authorize the Treasurer of Ontario to make loans out of the Consolidated Revenue Fund to the Fund on such terms and conditions as the Lieutenant Governor in Council directs. R.S.O. 1980, c. 373, s. 30 (3).

Benefits guaranteed

31.—(1) The pension benefits of a defined benefit pension plan that is wound up under subsection 28 (2) that are guaranteed by the Fund are,

(*a*) all pension benefits that must be contractually provided under clause 20 (1) (*a*) provided in respect of service in Ontario of an employee who, at the date of wind up of the plan, has been in the service of his employer for a continuous period of ten years or has been a member of the plan for a period of ten years and who has attained the age of forty-five years;

(*b*) all pension benefits in the course of payment to a retired member of the plan or his survivor or estate or to any person designated by the employee provided in respect of his service in Ontario and any such pension benefits the employee's survivor or estate or any person designated by him may become entitled to;

(*c*) all pension benefits that must be contractually provided under clause 20 (1) (*a*) provided in respect of service in Ontario of a former member of the plan who, at the date of termination of his employment, had been in the service of his employer for a continuous period of ten years or was a member of the plan for a period of ten years and who had attained the age of forty-five years; and

(d) the value of the contributions an employee was required to make and has made to the defined benefit pension plan in respect of service in Ontario, to the extent that the value of the contributions exceeds the value of the pension benefit credit of the employee, including the value of the pension benefit of the employee guaranteed under clause (a) or (c), plus the value of any voluntary additional contributions made by the employee to the defined benefit pension plan while the employee was employed in Ontario. R.S.O. 1980, c. 373, s. 31 (1); 1983, c. 2, s. 7.

Inclusion of bridging supplements and elections

31 (2) For the purpose of subsection (1), "pension benefits" includes bridging supplements, whether or not the bridging supplements have been excluded from the requirements of clause 20 (1) (*a*) and any pension benefit that the employee has elected to receive under section 26.

Payments not guaranteed

(3) The payment of,

(*a*) a pension benefit provided by a plan that has been in effect for less than three years at the date of termination or wind up; or

(*b*) any increase to a pension benefit that became effective within three years before the date of termination or wind up,

is not guaranteed by the Fund. R.S.O. 1980, c. 373, s. 31 (2, 3).

Payment by employer to defined benefit pension plan

32.—(1) The employer of employees who are members of a defined benefit pension plan that the employer is bound by or to which the employer is a party and that is partly or wholly wound up shall pay to the administrator, insurer or trustee of the plan an amount of money equal to the amount by which the value of the pension benefits guaranteed by section 31 plus the value of the pension benefits vested under the defined benefit pension plan exceeds the value of the assets of the plan allocated in accordance with the regulations for payment of pension benefits accrued with respect to service in Ontario.

Payment additional to other amounts

(2) The amount that the employer is required to pay under subsection (1) is in addition to the amounts that the employer is liable to pay under subsection 21 (2).

Manner of payment

(3) The employer shall pay the amount required under subsection (1) to the administrator, insurer or trustee of the defined benefit pension plan in the manner prescribed by the regulations. 1983, c. 2, s. 8, *part*.

Lien for payment out of Fund

33.—(1) The Commission has a lien and charge upon the assets of the employer of employees who are members of a defined benefit pension plan in respect of which the Commission pays money out of the Fund.

Amount of lien

(2) The lien and charge under subsection (1) is in an amount equal to the amount of the payment out of the Fund plus interest calculated at the rate and in the manner prescribed by the regulations.

Notice of lien

(3) The lien and charge under subsection (1) does not affect assets that are real property until a notice of the lien and charge that includes a description of the real property is registered in the proper land registry office and the Commission may so register notice of the lien and charge. 1983, c. 2, s. 8, *part*.

Penalties

39.—(1) Every person who contravenes any of the provisions of this Act or the regulations or who obstructs an officer or agent of the Commission in the performance of his duties is guilty of an offence and on conviction is liable to a fine of not less than $200 and not more than $10,000.

Idem

(2) Every employer who is convicted of an offence under subsection (1) shall pay to the insurer, trustee or administrator of the pension plan in respect of which the offence was committed all amounts that the employer has wrongfully failed to pay as required by this Act and the regulations.

Idem

(3) Where a corporation is guilty of an offence under this Act, an officer, director or agent of the corporation who directed, authorized, assented to, acquiesced in, or participated in, the commission of the offence is a party to and guilty of the offence and is liable on conviction to the punishment provided for the offence whether or not the corporation has been prosecuted or convicted.

Time limit for commencing proceedings

(4) No proceeding under this section shall be commenced more than two years after the time when the subject-matter of the proceeding arose. R.S.O. 1980, c. 373, s. 39.

APPENDIX IV

AN ANALYSIS OF LOST WAGES IN ONTARIO INSOLVENCIES

prepared for the
Commission of Inquiry on Wage Protection

by

Cary Swoveland
Quantalytics Inc.
Vancouver

October 1985

SUMMARY

Purpose

This study was undertaken for the Commission of Inquiry On Wage Protection to estimate wages and related benefits owing to workers in Ontario business failures. These estimates are needed to determine the magnitude of this problem and to cost policy options that would reimburse workers for some or all the amounts due to them.

Claims for Wages and Benefits

Estimates were made of outstanding and lost wages, vacation pay, pay in lieu of notice of termination and severance pay, in all Ontario insolvencies that occurred during the twelve-month period April 1, 1982 - March 31, 1983. "Outstanding" amounts are amounts that were owing at the time of the business failure; "lost" amounts are the portions of the amounts outstanding that were never paid.

The four types of claims considered in the study fall into two categories. The first consists of claims for wages and vacation pay. These claims clearly were for services rendered prior to the business failure. Moreover, vacation pay is deemed a trust in Ontario (Employment Standards Act, Section 15), which places claims for amounts outstanding ahead of those of unsecured creditors in the disposition of an insolvent firm's assets.

The second category consists of claims for pay in lieu of notice of termination, and for severance pay.

The termination notice requirement in Ontario ranges from one week's notice for employees having at least three months' service to eight week's notice for employees with ten or more years of service (two weeks' notice after two years; four weeks' notice after five years). In establishments having "mass" terminations of fifty or more employees in a four week period, however, the individual notice requirements are usually superseded by requirements of eight weeks' notice (at least 50 terminations), twelve weeks' notice (at least 200 terminations) or 16 weeks' notice (at least 500 terminations). Where the required notice is not given, most employees are entitled to pay in lieu of their wages for the applicable period of notice (Employment Standards Act, Section 40, and Regulation 286). For convenience, in this report we refer to pay in lieu of notice of termination as simply "termination pay".

Employers are liable for severance pay if 50 or more employees are terminated during a period of six months or less due to the closure of all or part of a business establishment. Most employees with at least five years of employment are eligible for severance pay benefits equalling their regular weekly wage multiplied by the number of years they have been employed by the company, to a maximum of 26 years (Employment Standards Act, Section 40a).

Unlike outstanding wages and vacation pay, claims for termination pay and severance pay generally are viewed by trustees and receivers as arising only at the time employment terminates, and therefore are assigned a lower priority for payment than are claims for wages and vacation pay and claims from unsecured creditors. In practice, collections for termination pay and severance pay are small in relation to the amounts outstanding.

The status that should be given to claims for termination pay and severance pay in Ontario insolvencies is an issue that is outside the scope of this study. The study recognizes, however, that different views may be held, and therefore presents estimates of claims for these benefits, as well as for wages and vacation pay.

The study does not consider amounts outstanding for withholding taxes, health insurance premiums, unemployment insurance, Canada Pension Plan, Workman's Compensation or other employee benefit plans.

Study Approach

The study combines a statistical analysis of claims for unpaid wages and benefits filed with the Ontario Ministry of Labour ("Ministry") over the one-year study period with an analysis of selected insolvencies identified in a survey of Ontario trustees in bankruptcy and receivers.

The study benefitted from detailed audits, performed by Ministry officers, of claims for outstanding amounts filed with the Ministry during the twelve-month period April 1, 1982 - March 31, 1983. Of several thousand such claims there were approximately 180 bankruptcies, 191 receiverships and 1,191 other types of insolvencies. The study analyzed 130 of the bankruptcies, 159 of the receiverships and 381 of the other insolvencies. (Information was lacking in the remaining cases). After scaling the results of the analysis to account for the cases not analyzed, it was estimated that among all insolvencies reported to the Ministry, approximately 21,100 workers had claims for amounts outstanding (7,500 were due wages, 18,900 were due vacation pay, 7,900 were due termination pay and 2,000 were due severance pay.)

An analysis of these insolvencies provided a good picture of numbers of workers with claims and total amounts owed, broken down by type of claim (wages, vacation pay, termination pay and severance pay), type of insolvency (bankruptcy, receivership or other type of insolvency), industry group and size of company. A stratified random sample of 617 employees from these firms was also analyzed to estimate distributions of amounts outstanding per worker, as well as to provide estimates of total amounts owed for each of the four types of wage claims. This analysis showed the total amount outstanding to be approximately $28 million, of which $6 million was for wages, $6 million was for vacation pay,

$10 million was for termination pay and $6 million was for severance pay. This analysis is presented in Section 3.

Although considerable detail was available for these "reported" insolvencies (i.e., insolvencies for which a claim was made to the Ministry during the twelve-month study period), the analysis was incomplete in two respects. Firstly, this analysis left unanswered questions concerning the numbers and sizes of Ontario insolvencies not reported to the Ministry. There was no basis, therefore, for deriving estimates of total amounts outstanding among all Ontario insolvencies over the study period. Secondly, some Ministry files were closed before all payments by trustees and receivers were made, resulting in collections being underestimated to an unknown extent.

To remedy both of these problems, Ontario trustees and receivers were surveyed on a confidential basis about the insolvencies for which they were appointed trustee or receiver during the study period. Some 459 insolvencies were identified in this survey.

To form a basis for selecting a sample of these insolvencies to examine in detail, employment information was requested for each of these companies from the Workman's Compensation Board ("WCB"). On the basis of this information, 272 insolvencies were dropped from the sample on the grounds that they probably accounted for relatively little outstanding wages and benefits, This left 187 insolvencies in which there may have been significant amounts outstanding.

It was found that a claim had been filed with the Ministry in 79 of the remaining 187 cases. Among the other 108 insolvencies in which no claim was filed, 18 had 25 or more employees at the time the trustee or receiver was appointed, based on the WCB employment statistics. Fourteen of these 18 cases, together with a sample of 17 reported insolvencies with 25 or more employees, were subjected to detailed analysis. The trustees and receivers acting in these 31 insolvencies were asked to estimate lost wages, lost vacation pay, total realizations of assets and total realizations of assets excluding real property. The information on realizations was requested in order to assess the potential effectiveness of "super-priority" options.

These survey results provided a basis for estimating the extent of amounts outstanding and lost in all Ontario insolvencies during the study period.

Lastly, statistics on annual numbers of Ontario business bankruptcies since 1977 were used to provide an indication of how the numbers and sizes of outstanding wages and benefits arising from insolvencies might change in the future.

Outstanding and Lost Wages and Benefits

The main results of the study are summarized in Exhibits 1, 2 and 3. It is important to recognize that the estimates presented in these graphs are only approximate, largely because of the relatively small sample sizes of insolvencies subjected to detailed analysis in the survey of trustees and receivers, but also for various other reasons that are discussed in Section 3.

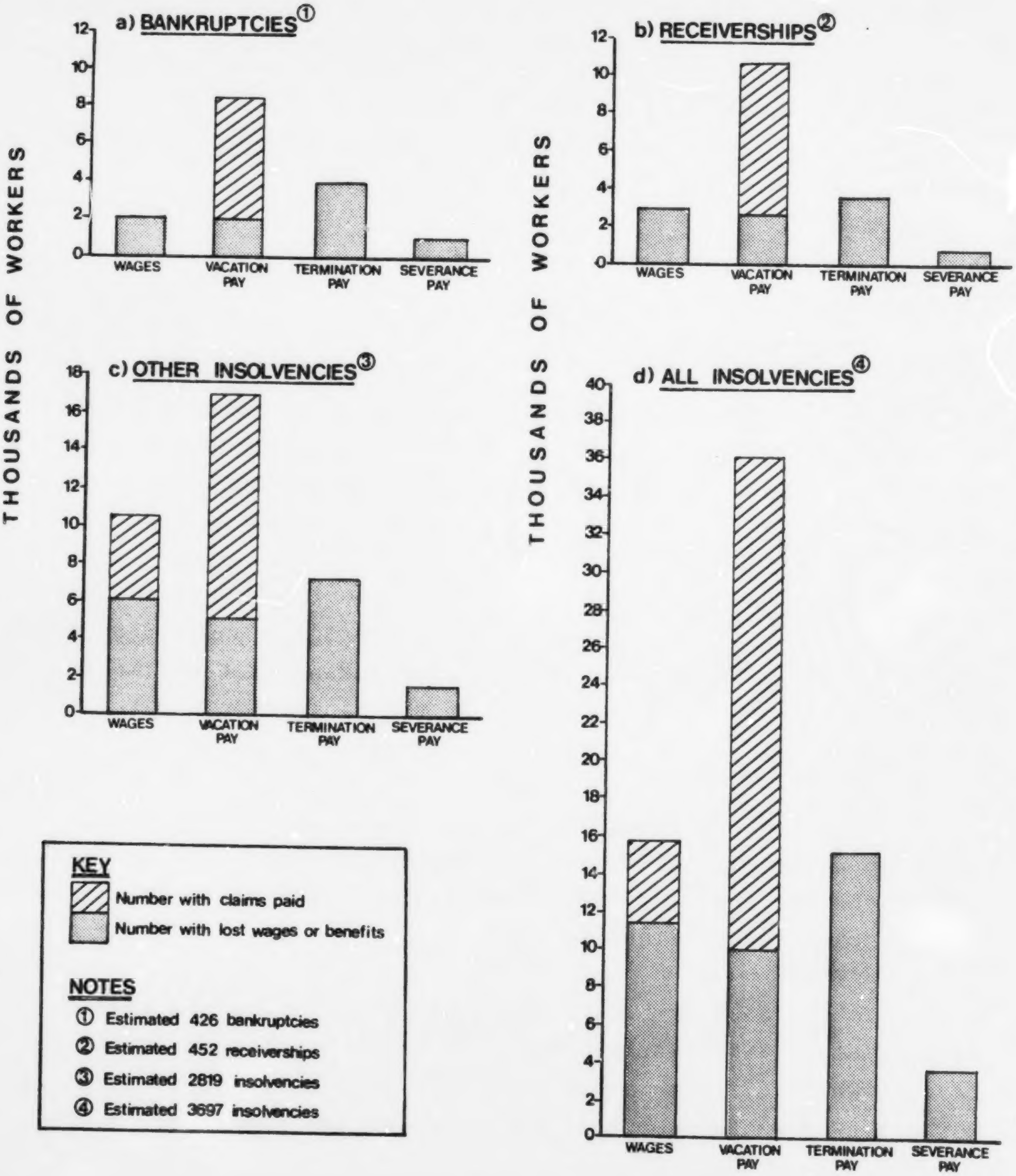
During the twelve-month study period there were in Ontario an estimated 426 bankruptcies, 452 receiverships and 2,819 other insolvencies in which amounts were outstanding at the time the trustee or receiver was appointed or the Ministry's audit was begun. The derivation of these estimates is given in Section 4.

Exhibit 1 shows estimated numbers of workers with outstanding wages, vacation pay, termination pay and severance pay, during the study period, for bankruptcies, receiverships, other insolvencies and all insolvencies.

In the case of bankruptcies, the analysis shows that approximately 8,500 workers had claims for outstanding vacation pay, of which all but about 2,100 were eventually paid. Very few workers owed wages (about 2,200), termination pay (about 4,200)

EXHIBIT 1

Estimated Number of Workers Owed Wages or Benefits in Ontario Insolvencies: April 1, 1982 – March 31, 1983



NOTES

① Estimated 426 bankruptcies
② Estimated 452 receiverships
③ Estimated 2819 insolvencies
④ Estimated 3697 insolvencies

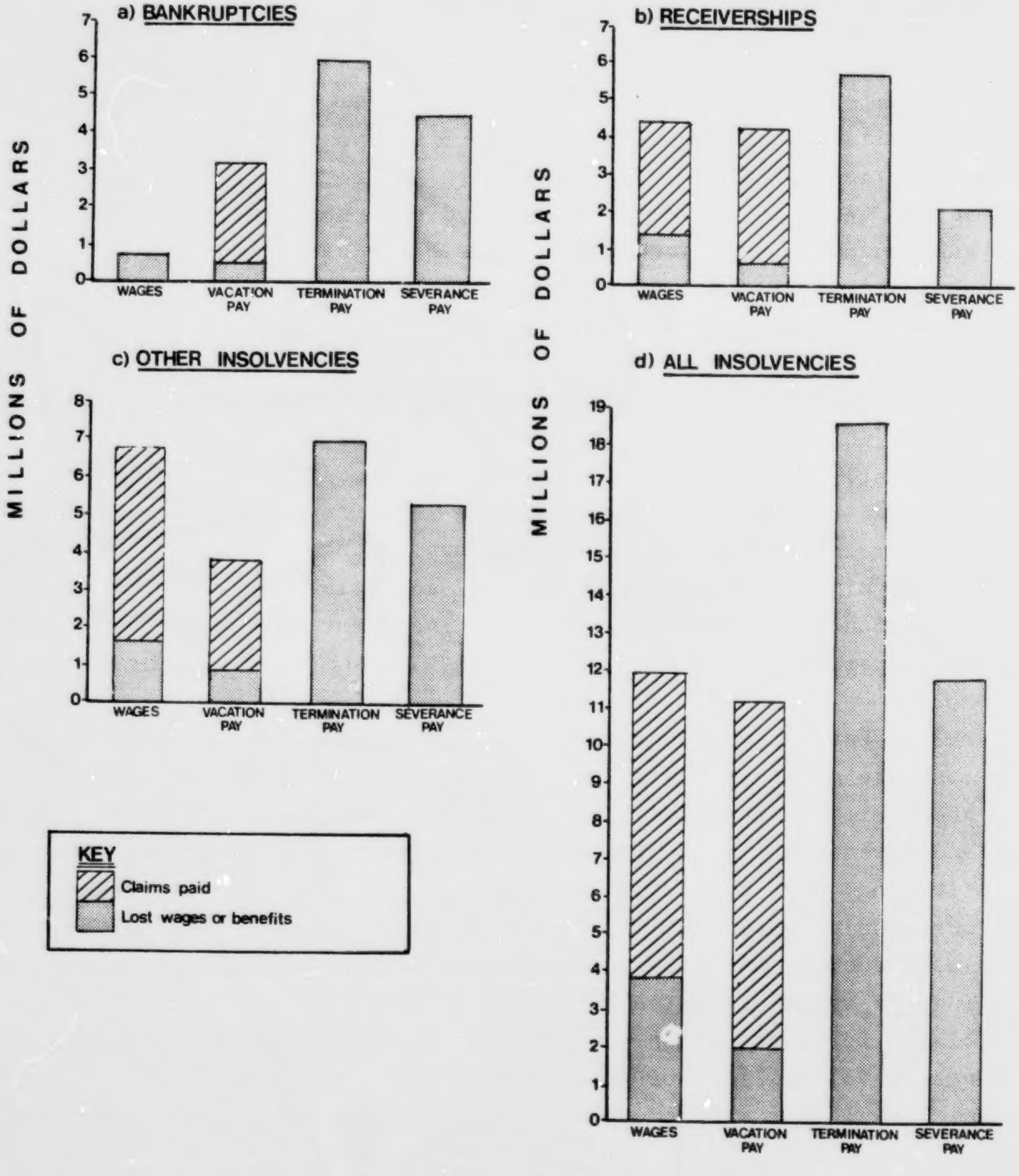
or severance pay (about 1,200) received any compensation. In receiverships, somewhat more workers had outstanding wages and vacation pay, but fewer workers were owed termination pay and severance pay. The proportions of workers in receiverships who were left with outstanding claims is similar to the experience with bankruptcies. "Other insolvencies" account for the largest numbers of workers with claims in all four wage categories. (While some workers with unpaid wages in bankruptcies and receiverships certainly were recompensed--in part or in full--inadequacies and contradictions in the data prevent their numbers from being estimated. The average amounts paid were substantially larger in receiverships, however, as will be shown below. The estimates of workers with claims for termination pay and sever- ance pay may be overestimated somewhat, as it includes unknown numbers of workers who were hired back and had their seniority reinstated after the company was sold as a "going concern" or refinanced.)

Among all insolvencies, approximately 72% of an estimated 36,000 workers with outstanding vacation pay were paid. By contrast, only about 16,000 workers were owed wages, of which about 28% collected. Approximately 15,000 and 3,700 workers were due termination pay and severance pay, respectively, and very little of this was paid. In total, an estimated 40,000 workers had amounts outstanding in Ontario insolvencies during the study period.

Estimates of the magnitudes of the amounts outstanding and lost are shown in Exhibit 2. The most striking aspect of these graphs is the relatively large amounts owed for termination pay and severance pay. Although fewer workers were owed these benefits than were owed wages or vacation pay, the average amounts outstanding were much larger. This exhibit shows that, for all insolvencies, $23 million in wages and vacation pay was outstanding, of which all but about $6 million was paid. By contrast, claims for termination pay and severance pay together totalled nearly $31 million, of which relatively little was paid.

EXHIBIT 2

Estimated Outstanding and Lost Wages and Benefits in Ontario Insolvencies : April 1, 1982 - March 31, 1983 (millions of 1982 dollars)



Average amounts outstanding per worker are shown in Exhibit 3. Claims for severance pay are by far the largest, averaging about $3,200 per worker, with some claims being $12,000 or more. As noted above, however, only about 3,700 workers were due severance pay. The amounts owed for termination pay were also substantial, averaging about $1,200 and extending in some cases to as much as $5,000. Lost wages and vacation pay both averaged about $300, but ranged up to several thousand dollars in some cases.

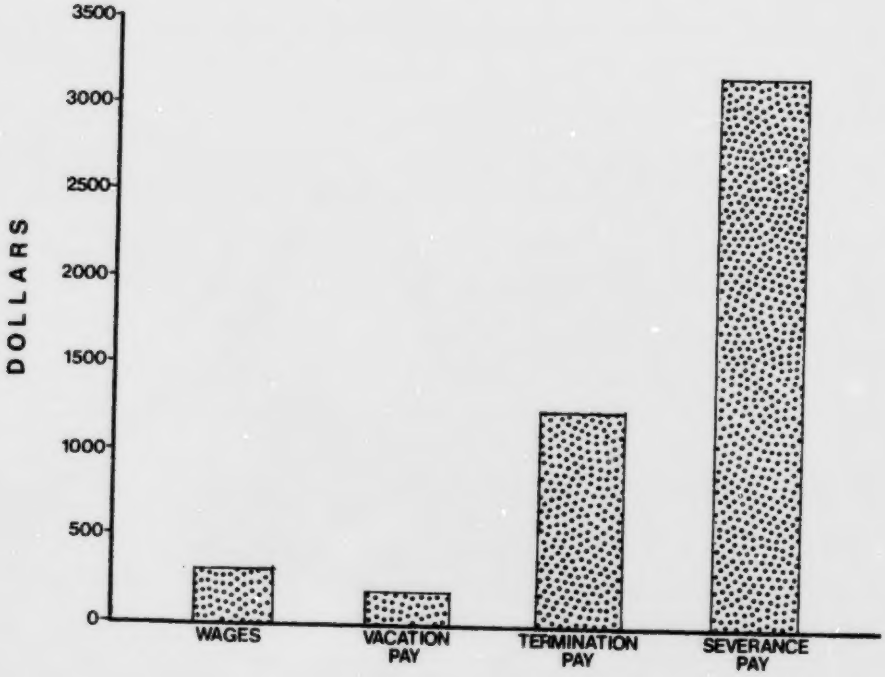
Assets Available for Distribution

Estimated realizations of assets for the 31 insolvencies subjected to detailed analysis totalled approximately $35 million, of which about $31 million was exclusive of real property (i.e., net of assets which may have been mortgaged). Total realizations amounted to approximately $11,000 per worker employed by these companies at the time they became insolvent. In the six insolvencies in which workers lost vacation pay, realizations net of real property were 20 times as large as vacation pay losses; in none of these cases did lost vacation pay exceed realizations net of real property. In the eight insolvencies in which workers lost wages, realizations net of real property were approximately six times as large as lost wages; in only two cases did lost wages exceed realizations net of real property.

Comparisons of realizations of assets with outstanding termination pay and severance pay could only be made for the 17 reported insolvencies. Termination pay was outstanding (and lost) in 11 of the cases; severance pay was outstanding (and lost) in seven cases. In only three cases were realizations net of real property less than the total amounts outstanding in wages, vacation pay, termination pay and severance pay. In these three cases, approximately 700 workers had claims totaling $1.9 million. In one case, with claims by 191 workers totaling $1.2 million, realizations totalled $2.6 million, but this was all in real property. In the other two cases, realizations were 59% and

EXHIBIT 3

Average Lost Wages and Benefits per Worker in Ontario Insolvencies: April 1, 1982 – March 31, 1983 (in 1982 dollars)



69% of total claims, respectively, with none of the assets being real property. Total claims over all 17 insolvencies were approximately 18% of total realizations net of real property.

Although these results are based on relatively small samples of insolvencies, they suggest that the establishment of a "super-priority" for wages and benefits probably would be an effective way of funding most claims for outstanding wages and benefits, regardless of whether it covered wages and vacation pay only, or was extended to termination pay and severance pay. There certainly would be cases, however, where realizations would be insufficient to satisfy some or all of the amounts outstanding, and workers could be subjected to delays in getting paid, depending on the provisions of the super-priority.

A super-priority might have other disadvantages when compared with other policy options that may be available. It is sometimes argued, for example, that lenders would respond to the establishment of a super-priority by restricting the availability or increasing the cost of debt capital, or by structuring loans in such a way as to circumvent the super-priority, regardless of how the latter were implemented. The analysis of these and other arguments, however, is outside the scope of this study.

Future Losses of Wages and Benefits in Insolvencies

The estimates of lost wages and benefits arising from Ontario insolvencies during the twelve-month period April 1, 1982 - March 31, 1983 are not representative, of course, of what could be expected in the future if nothing were done to remedy the problem. The study period coincided with the lowest point of a very severe recession. It is reasonable to expect, therefore, that the problem will be less serious over the next several years.

To provide a rough indication of the potential size of the problem of lost wages and benefits in the future, the findings for the study period have been scaled in proportion to annual numbers of Ontario business bankruptcies between 1977 and 1983. The results are presented in Exhibits 4 and 5 for lost wages and vacation pay, and in Exhibits 6 and 7 for lost termination pay and severance pay. (The projections for severance pay assume that the same severance pay provisions applied throughout the 1977-1984 period; in fact, eligibility for severance pay was only legislated in 1981.)

To understand how these estimates were derived, consider the estimates in Exhibit 4 of the numbers of workers owed vacation pay. The amounts shown for each year equal the estimated numbers of workers that would have lost vacation pay during the study period April 1, 1982 - March 31, 1983 had the annual rate of Ontario business bankruptcies over the study period equalled the levels prevailing in each of those years. Here we assume, for example, that had the number of business bankruptcies in the study period equalled the number that occurred in 1977 (1,760), instead of the number that actually occurred (3,385), the number of workers with lost vacation pay would have been approximately 52% (1760/3385 x 100%) of the number that actually lost vacation pay during that period (i.e., 52% of an estimated 10,018 workers, or about 5,200 workers). The same approach was taken to estimating the dollar values of claims at the different annual bankruptcy rates.

There are obvious weaknesses with this simplistic method of estimation, not the least of which are the implicit assumptions that claims arising from all types of insolvencies are proportional to total numbers of business bankruptcies and that the experience of the recent past should be a guide to the future. Nevertheless, it is clear that Ontario business bankruptcies increased steadily prior to 1982, reached a peak during the study period, and then began a sharp decline in 1983 which has continued to the present.

Although part of this decline may reflect changes in the relative frequency of bankruptcy as compared with other types of insolvencies (particularly in light of increasing creditor use of

EXHIBIT 4

Estimated Annual Number of Workers with Lost Wages and Vacation Pay in Ontario Insolvencies, at Business Bankruptcy Rates Experienced between 1977 and 1984

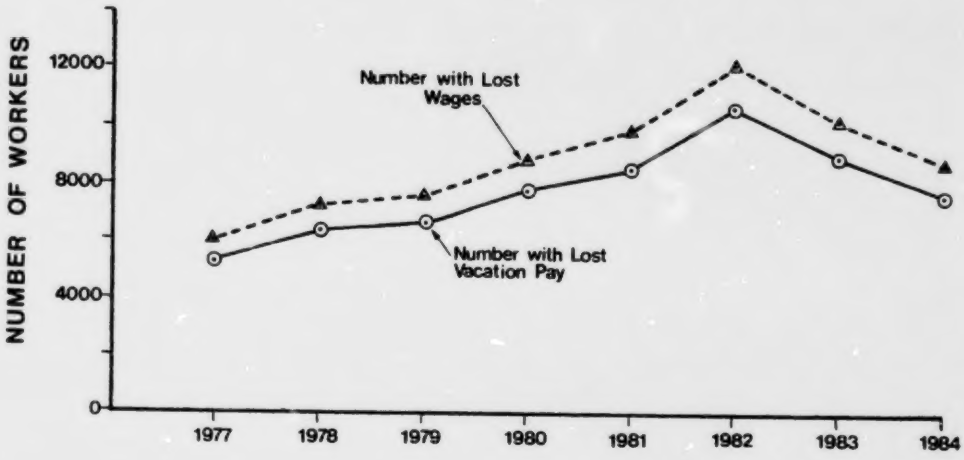


EXHIBIT 5

Estimated Annual Lost Wages and Vacation Pay in Ontario Insolvencies, at Business Bankruptcy Rates Experienced between 1977 and 1984

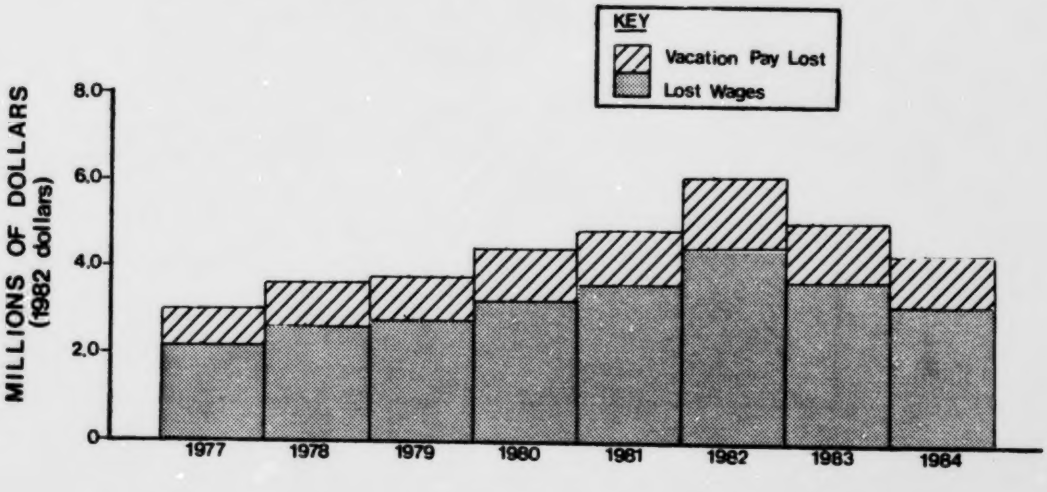


EXHIBIT 6

Estimated Annual Number of Workers with Lost Termination Pay and Severence Pay in Ontario Insolvencies, at Business Bankruptcy Rates Experienced between 1977 and 1984

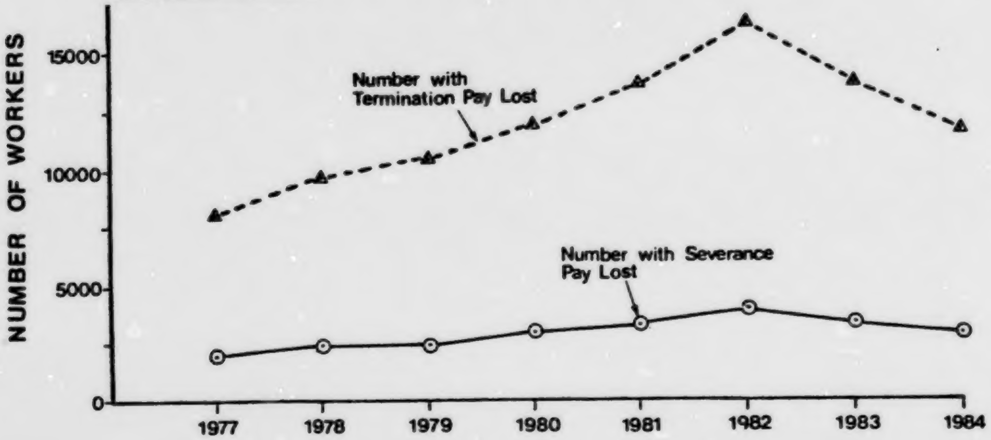
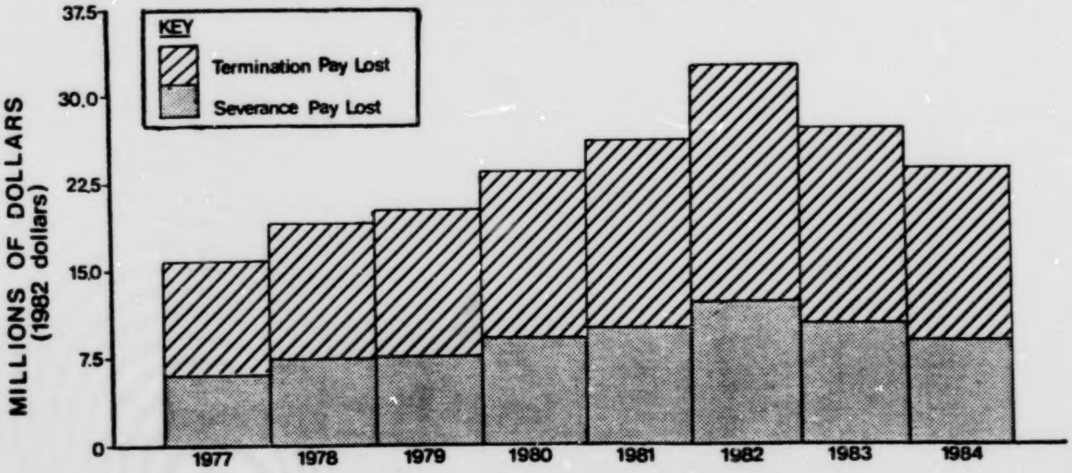


EXHIBIT 7

Estimated Annual Lost Termination Pay and Severence Pay in Ontario Insolvencies, at Business Bankruptcy Rates Experienced between 1977 and 1984



general security agreements under Ontario's Personal Property Security Act and Corporation Securities Registration Act), another part reflects the general strengthening of most firms that survived the recession. Considering that current medium-term forecasts for the Ontario economy are reasonably optimistic, it appears unlikely that annual lost wages and benefits over the next few years will approach the levels experienced during the study period.

ACKNOWLEDGEMENTS

The author wishes to thank several individuals for their important contributions to this study. At the Ministry of Labour, Keith Armstrong, Christine Deacon and James St. John were extremely helpful in explaining the complexities of wage protection issues and policies, in obtaining the vast amounts of detailed information that were needed for the statistical analysis, and in providing highly useful comments on a draft of this report.

David Murray, as a member of Clarkson Gordon Inc. and President of the Ontario Insolvency Association, provided valuable insights into the perspectives held by all parties involved in insolvencies. He also made numerous excellent suggestions for improving the study methodology, and played a central role in the design of surveys of Ontario trustees in bankruptcy and receivers undertaken by the Inquiry.

Donald Brown, the Inquiry's Commissioner, set out the direction and objectives of the study and provided advice throughout on how to resolve the more difficult issues. The study also benefitted greatly from his ability to get the most out of our working meetings and to mobilize the resources needed to get the job done.

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SECTION 1
INTRODUCTION

Purpose of Study

Soon after the establishment of the Commission of Inquiry On Wage Protection, its commissioner, Mr. Donald J.M. Brown, Q.C., concluded that a detailed statistical analysis of wage claims arising from insolvencies was needed, both to provide a clearer understanding of the nature and magnitude of the problem, and to establish a basis for estimating the potential cost and effectiveness of proposed remedies. Quantalytics Inc. was asked to perform this analysis. This report describes the findings of that study.

It is noteworthy that, despite the considerable attention that has been given to the problem of lost wages and benefits arising from Canadian insolvencies, at both the provincial and federal levels, relatively little quantitative analysis has been done to determine the extent of the problem and to assess the implications of various initiatives that have been proposed to deal with it. How often do workers lose wages and benefits as a result of companies becoming insolvent? How large are these wage claims? How much would it cost the public treasury to institute a program to recompense workers for lost wages? What would be the cost of premiums to fund an insurance scheme for covering such wage claims? To what extent would giving wage claims a "super-priority" in the distribution of an insolvent firm's assets help workers recover monies owed them? The answers to these and related questions clearly are central to the resolution of the public policy issues concerning wage protection.

To help answer some of these questions about the size and nature of the wage protection problem in Ontario, this study was commissioned to estimate wage claims arising from Ontario business failures. To this end, the twelve-month period April 1, 1982 to March 31, 1983 was selected for analysis. The study estimated the numbers of workers with wage claims in insolvencies during this period, and total amounts owed for each of four categories of claims: wages, vacation pay, pay in lieu of notice of termination (hereafter referred to as simply "termination pay") and severance pay. Estimates were made of both amounts "outstanding" at the time of insolvency and the portions of those amounts that were never collected, which we refer to as "lost" amounts. In addition, estimates were made of statistical distributions of amounts outstanding per worker affected for each of the four wage categories.

Overview of Study Methodology

The first step of the analysis involved a detailed statistical analysis of 670 of an estimated 1,562 bankruptcies, receiverships and other insolvencies for which claims for outstanding wages or benefits had been filed with the Ministry during the twelve-month study period. In addition to analyzing summary statistics for each of these companies, a stratified random sample of 617 employees was drawn from these companies and analyzed.

In order to estimate amounts outstanding and lost in insolvencies not reported to the Ministry during the study period, Ontario trustees and receivers were asked in a survey to identify all insolvent companies for which they had been appointed trustee or receiver during the study period (on the understanding that their responses would be confidential to the Inquiry). The insolvencies identified in this survey were then checked against Ministry records to determine which had been reported to the Ministry. In addition, employment information for these companies was obtained from the Workman's Compensation Board ("WCB").

A sample of 31 insolvencies identified in the survey of trustees and receivers having 25 or more employees were subjected to detailed analysis. Claims for wages or benefits had been filed with the Ministry in 17 of these cases, whereas no claims had not been filed in the other 14 cases. For each of these insolvencies, the trustee or receiver was asked to provide estimates of lost wages, lost vacation pay, and total realizations of assets.

The estimates of lost wages and vacation pay were combined with employment figures to estimate losses on a per worker basis, which in turn were used to estimate lost wages and vacation pay for all Ontario insolvencies that occurred during the twelve-month study period. Very little of the outstanding termination pay and severance pay was collected. Hence, outstanding and lost amounts were estimated to be the same for these two types of benefits. The information on realizations of assets was used to assess the potential effectiveness of "super-priority" options.

The final step of the analysis consisted of combining the estimates derived for the reported and unreported insolvencies to produce estimates of amounts outstanding and lost, and numbers of workers concerned, in all Ontario insolvencies during the study period.

Organization of Report

The methodology used in the analysis is explained in detail in Section 2. The details of the construction of the employee sampling plan are in Appendix B; the variances of the estimators used in the analysis of the employee sample are derived in Appendix C.

The analysis of the reported insolvencies is presented in Section 3; the analysis of unreported insolvencies and the derivation of the estimates of total outstanding and lost wages and benefits in all Ontario insolvencies is given in Section 4.

Readers who are primarily interested in the results of the analysis may wish to read the Summary for the principal findings and to skim Sections 3 and 4 for any specific results of interest.

SECTION 2
METHODOLOGY

Analysis of Reported Insolvencies

All bankruptcies, receiverships and other insolvencies were first identified from among several thousand wage claim cases processed by the Ministry during the twelve-month study period, April 1, 1982 to March 31, 1983. This was done by reviewing summary records of each claim filed with the Ministry during the study period. There were in total an estimated 1,562 insolvencies, of which 180 were bankruptcies, 191 were receiverships and 1,191 were other insolvencies. The "other insolvencies" consisted of 496 "defunct" companies, 440 companies in which owners could not be located and 255 out of 319 companies (i.e., an estimated 80%) against which an order to pay had been issued by the Ministry under Section 54 of the Employment Standards Act.

In many cases--particularly among the "other insolvencies"--there was insufficient information available to determine numbers of workers with claims or amounts outstanding. In other cases it was necessary to review project files to obtain missing data. Considerable follow-up work was done to determine the status of particular cases, to verify or correct questionable entries in the summary records, to obtain information for missing entries, etc. Through this process, 670 insolvencies were identified for detailed analysis, consisting of 130 bankruptcies, 159 receiverships and 381 other insolvencies.

Construction of Data Base on Reported Insolvencies

Summary information on these insolvencies was entered into a computer database for detailed analysis. For each firm, the following information was recorded:

- file number;
- location of firm by region of province;
- month in which case was opened;
- code indicating type of insolvency;
- code indicating type of business;
- number of workers owed vacation pay;
- total outstanding vacation pay;
- number of workers owed termination pay;
- number of workers owed severance pay;
- total outstanding severance pay;
- number of workers owed unpaid wages;
- amount of assessment collected through Ministry efforts;
- reason for no collection if part or all of assessment was not collected.

Various verification checks were made during data entry to ensure that both the number and magnitude of errors were kept to a minimum.

Analysis of Reported Insolvencies

The numbers of workers with claims among the 670 analyzed cases were scaled up to account for amounts outstanding among the 892 reported insolvencies which were not analyzed. In performing this scaling (for each category of insolvency) it was assumed that numbers of workers per company with claims, the average claims per worker and the average amount collected were the same for the unanalyzed insolvencies as for the analyzed ones. In the case of bankruptcies, for example, total numbers of workers owed wages, vacation pay, termination pay and severance pay, average amounts outstanding in vacation pay and severance pay, and average total amounts outstanding and collected were all multiplied by the ratio 180/130, 180 being the estimated total number of reported bankruptcies and 130 being the number of reported bankruptcies that were analyzed.

The analysis of the summary data on reported insolvencies provided a good overall picture of the numbers of workers with wage claims. This analysis was deficient, however, in several respects.

Firstly, the summary statistics for each firm reflected the maximum entitlements per employee set out in the Ontario Employment Standards Act, whereas the amounts of principal interest were total wages and benefits actually owed. Some workers with long tenure, for example, were due more in vacation pay than the 4% of annual wages to which they were entitled under the Employment Standards Act. Also, because of the $4,000 limitation on the total of all benefits other than severance pay, the total assessments for termination pay, unpaid wages and other benefits were in some cases less than the actual amounts owed.

Secondly, these company-level records did not provide any indication of the distributions of the sizes of wage claims. Yet, this information would be needed to assess policies which limited maximum (or minimum) claims, either by type of wage or benefit outstanding or in total.

Thirdly, the amounts recorded for collections apparently did not include some payments of claims that were made after Ministry files were closed. Hence, the information in Ministry files was believed to overestimate (to an unknown extent) some amounts outstanding.

Lastly, the Ministry files gave no indication of the amounts of assets available for distribution, which was needed for the assessment of "super-priority" options.

Analysis of Sample of Employees from Insolvencies

To address the first two weaknesses cited above, a stratified random sample of 617 employees was drawn from the 670 insolvencies and analyzed in detail. (To deal with the other two weaknesses it was necessary to obtain additional information for a sample of these insolvencies from trustees and receivers, as explained later in this section.) The sample spanned 198 strata defined on the basis of different combinations of three types of insolvencies, eleven industry groups and six sizes of firm. The total sample size was chosen to yield a satisfactorily-small variance for the estimate of total wage claims; the proportion of the total sample drawn from each stratum was chosen in such a way as to obtain, for the given sample size, a near-minimum variance estimator of total wage claims for all employees of all 670 firms. A description of the statistical basis for the sampling plan is given in Appendix B.

For purpose of stratification, companies were grouped into a) bankruptcies; b) receiverships; and c) other insolvencies. With regard to type of company, firms were initially coded by Ministry officers as being one of 49 different kinds of business. For purposes of analysis, these were grouped into ten categories:

- service;
- retail;
- construction;
- agriculture;
- financial;
- transport;
- manufacturing;
- forestry and mining;
- government and non-profit; and
- other.

Finally, firm size was divided into the following six categories:

- 0 to 9 employees;
- 10 to 24 employees;
- 25 to 49 employees;
- 50 to 99 employees;
- 100 to 199 employees; and
- 200 or more employees.

The following information was recorded for each employee sampled:

- file number;
- month and year hired;
- month and year of termination;
- outstanding vacation pay;
- outstanding termination pay;
- outstanding severance pay;
- unpaid wages; and
- amount collected.

Information on unpaid fringe benefits, such as health care premiums, was incomplete and therefore was not collected and analyzed. These unpaid benefits are believed to be relatively small, however. Furthermore, no attempt was made to estimate unpaid pension plan contributions or unpaid withholding tax or social security contributions.

As in the case of the company-level statistics, this information was entered into a computer database, with various verification checks being made to minimize the number and size of data entry errors. Because records in both databases contained the file number, it was possible to correlate information in the two files.

Adjustment of Vacation Pay Owed to Employees in Sample

It was next necessary to adjust the amounts of vacation pay owed per employee. Unfortunately, the actual amounts due, as set out in labour agreements or as per company policy, were not recorded in Ministry files. Estimates of actual amounts owed were derived, therefore, on the basis of employee tenure. To this end, union agreements were examined for all unionized firms from which employees were sampled, except for a few cases where a copy of the agreement was unavailable. Although the vacation pay provisions varied considerably, on average, the benefit increased from the statutory minimum of 4% of annual pay to 6% after about 8 years of employment and to 8% after about 15 years of employment. In very few cases did the benefit ever exceed 8%, and few, if any, employees in the sample would have had sufficient tenure to qualify for a larger benefit. No information was available on the relationship between vacation pay benefits and tenure for non-unionized firms.

Vacation pay owed therefore was increased by 50% (i.e., from 4% to 6% of annual pay) for all employees in the sample with between 8 and 14 years of employment, and by 100% (i.e., from 4% to 8% of annual pay) for all employees in the sample with 15 years or more of employment. This adjustment could be expected to be biased on the high side for non-unionized employees. On the other hand, information on tenure was not available for approximately one-third of the employees in the sample and no adjustment in vacation pay was made in these cases. (Generally, information on employee tenure was recorded for either all or none of a firm's employees.)

Of the 617 employees in the sample, vacation pay was adjusted upward by 50% for 44 employees (7%) and by 100% for 27 employees (4%). This increased the total vacation pay owed to these 617 employees from $204,967 to $235,633 (an increase of 15%).

Analysis of Employee Sample

Three separate analyses were performed with the employee sample. These differed in the aggregations selected for calculation and presentation. These were as follows:

- type of insolvency
    - bankruptcies,
    - receiverships,
    - other insolvencies,
    - all insolvencies;

- type of firm
    - manufacturing firms,
    - service industries,
    - other industries,
    - all insolvencies;

- size of firm
    - 0 to 49 employees,
    - 50 to 199 employees,
    - 200 or more employees,
    - all insolvencies.

The statistical procedures used can best be explained by considering their application to the first of these three classifications.

Firstly, bankruptcies were considered. Means and variances for each wage item, for amounts collected and for total amounts owed, were estimated for each of the 66 strata which contained employees from bankrupt firms. For each wage item, these estimates applied only to those employees in the sample owed something (or in the case of collections, to those employees that collected part or all of the amount owed). If, for example, a particular stratum contained 20 employees and only 10 were owed vacation pay, then the estimated mean and standard deviation for vacation pay owed would be calculated from the claims of the 10 owed vacation pay.

The means and variances of each pay component were then combined with summary information for the firms represented in the stratum to provide estimates of the total amounts due all employees of these firms. The summary information used in these calculations was the total number of employees having a claim for each wage item. The estimate of the total amount of vacation pay owed all employees in the stratum, for instance, would be calculated as the total number of employees owed vacation pay times the average amount of vacation pay due to those employees in the sample who were owed vacation pay. If, for example, 600 employees in the stratum were owed vacation pay and the sample of employees for the stratum contained 10 who were owed vacation pay totalling \$5,000, the estimate of the total amount of vacation pay owed all employees in the stratum would be:

$$(600)(\$5{,}000/10) = \$300{,}000.$$

It follows that if the standard deviation of the amount of vacation pay owed per employee were estimated from the sample of 10 employees to be, say, \$200, the standard deviation of the total amount of vacation pay owed all employees in the stratum would be:

$$(600)(\$200)/(10)^{.5} = \$37{,}947.$$

Further, the estimated standard deviation of the sample average (i.e., the standard error of the mean) would be:

$$(\$200)/(10)^{.5} = \$63.2.$$

The estimated total amount owed all employees in the stratum is simply the sum of the estimated totals for each wage component (i.e., vacation pay, unpaid wages, termination pay, and severance pay.) The variance of this estimate therefore equals the sum of the variances of the estimated totals for each wage component. Note that the estimate of the total amount owed does not reflect any amounts collected. Appendix C provides an explanation of how the variances of the estimators were derived.

In the course of calculating means and variances for each wage item and stratum, estimates are also made of frequency distributions of amounts owed and amounts collected. These were done first for the employee sample and then were extrapolated to the stratum by multiplying the frequencies for each dollar interval from the sample by the ratio of the number of employees in the stratum with amounts outstanding for the particular wage item to the number of employees in the sample with amounts outstanding for the particular wage item.

Note that the estimates of the total amounts owed, for each wage item and in total (as well as the frequency distributions), for each stratum, could have instead been estimated by simply extrapolating the means of the employee samples to the population by multiplying them by the ratio of the size of the population (in the stratum) to the size of the sample (in the stratum). While this more conventional approach would have also provided unbiased estimates, the variances of the estimators would have been significantly larger than those of the estimators used in the analysis. (The higher variance is due to the fact that the more conventional approach does not make use of some information available from the summary information for the insolvent firms: the number of employees owed monies, for each wage item.) The standard deviations of the estimators used in the analysis were 30%-70% smaller than the standard deviations associated with the conventional estimators.

The procedure used was repeated for all strata involving bankruptcies. The estimated total amount due all employees of bankruptcies, for each wage item, was simply the sum of the respective total amounts for each of the 66 strata involving bankruptcies. The example calculation above of $300,000 owed in vacation pay to the employees in one stratum would be added to similarly-derived estimates for each of the other 65 strata. The variance of the estimate of the total is simply the sum of the variances of the estimates for each stratum. The illustrative standard deviation calculated above ($37,947) would have been squared to obtain the variance of the estimate and this would have been added to variances computed in the same manner for each of the other 65 strata. Frequency distributions were simply added across strata.

Relative frequency distributions for each wage item, for all bankruptcies, were then derived by dividing the total estimated frequency for each dollar interval by the total number of employees of bankrupt firms who were owed monies for the particular wage item.

This procedure was then repeated for the 66 strata involving receiverships and 66 strata involving other insolvencies.

Lastly, estimates of the mean and variance of the total amount owed to all employees of all insolvencies, for each wage item, were obtained by adding the estimated mean and variance of the total amount owed to employees of bankruptcies to the corresponding estimates for receiverships and for other insolvencies. Frequency distributions were summed in a similar manner.

Complications in Analysis of Employee Sample

Two complications with this procedure deserve mention. First, due to the sampling procedure, some strata containing a few small firms were not represented in the employee sample. It therefore was necessary to adjust upwards the estimates derived from the sample of wages and benefits owed. For each wage item and type of insolvency (i.e., bankruptcy or other insolvency), the total estimated amount owed all employees of the insolvent firms was multiplied by a factor:

$$(N+M)/N,$$

where N is the total number of employees owed the particular wage item among insolvencies of the given type represented in the employee sample and M is the total number of employees owed the particular wage item among insolvencies of the given type that are not represented in the employee sample. Typically, M was very small relative to N. The previously-computed standard deviations and frequency distributions of the estimate were therefore adjusted upward by the same factors.

Note that, because of this adjustment, the estimates of the total amounts owed and the total amount collected depend on the choice of stratification. It will be shown in Section 3 that the estimated totals vary somewhat among the three stratifications analyzed.

The second complication concerned the estimation of the total amount collected. The difficulty here is that the summary information for each firm did not indicate the number of employees who collected part or all of the amount owed them. In general terms, for strata represented by one or more employees in the employee sample who collected part or all of the amount due them, the total number of employees in the stratum who were paid something was estimated to be the total number of employees in the stratum multiplied by the proportion of employees in the sample (i.e., in the given stratum) who were paid something. Means, variances and frequency distributions of amounts collected were calculated in the same manner as were corresponding quantities for the various wage items.

A rather complicated adjustment in the estimates of total amounts collected (and the associated variances and frequency distributions) was needed to account for strata which were not represented in the employee sample.

Analysis of Unreported Insolvencies

As part of the Inquiry, Ontario trustees and receivers were asked in a survey for the names of all businesses for which they were appointed trustee or receiver between April 1, 1982 and March 31, 1983. It was explained that this information was needed to estimate the nature and extent of wage claims arising from insolvencies that were not reported to the Ministry, and that the information which they provided would be treated as confidential by the Inquiry.

Of the 29 firms asked to participate in the sample, 20 cooperated in providing the information requested. Most of the nine which did not declined on the grounds that the information requested was privileged.

Analysis of Survey Returns

The 20 respondents reported approximately 210 bankruptcies, 240 receiverships and 50 cases which began as receiverships and later became bankruptcies. Of these, approximately 40 were eliminated because of incomplete information, leaving 459 insolvencies.

These 459 insolvencies were then checked against Ministry files to determine which had been reported to the Ministry. It was found that in 79 cases a claim had been filed. Note that claims actually may have been made in some of the cases where no match was found, because the file was misplaced, the company was listed by the Ministry under a different name or for some other reason. Hence, the proportion of all Ontario insolvencies that were reported to the Ministry is probably somewhat higher than the number estimated by this procedure.

At the same time that these insolvencies were being checked against Ministry files, the WCB was asked to provide employment statistics for each company. The WCB had no records for 145 of the companies. While in some cases this may have been because the WCB had listed the company under a different name than that reported by the trustee or receiver, generally it was because the company was very small, often a family-run business. Another 127 companies which were registered with the WCB were found to be very small operations, generally with no more than two employees. These 272 insolvencies were dropped from the sample on the grounds that they probably accounted for relatively little outstanding wages and benefits.

This left 187 insolvencies in which wages or benefits may have been outstanding, of which 79 had been reported to the Ministry and 108 had not been reported.

Estimated Number of Unreported Insolvencies

To estimate the total number of unreported insolvencies in Ontario during the one-year study period in which amounts were outstanding, it was assumed that, for each of the three types of insolvencies, the ratio of unreported insolvencies to reported insolvencies was the same as the ratio of unreported to reported insolvencies in the survey of trustees and receivers (i.e. 108/79). Moreover, for each type of insolvency and wage claim, the average number of workers per insolvency with amounts outstanding was assumed to be the same for unreported insolvencies as for reported insolvencies.

Outstanding Wages and Benefits in Unreported Insolvencies

With the exception of outstanding wages in bankruptcies, average amounts outstanding per employee were assumed to be the same for unreported bankruptcies and receiverships as for reported ones. This assumption probably resulted in outstanding wages and benefits in unreported insolvencies being overestimated, but because no information was available from trustees and receivers on amounts outstanding in bankruptcies and receiverships (as opposed to amounts lost) and no information at all was available on unreported other insolvencies, it appeared to be a reasonable assumption under the circumstances. When this approach was taken to estimate outstanding wages in bankruptcies, however, it was found that the estimate for total outstanding wages were less than estimated total wages. Considering that outstanding wages in bankruptcies generally were not paid, it was assumed that outstanding wages in unreported bankruptcies were the same as amounts lost.

Estimation of Lost Wages and Benefits

The portions of outstanding wages and benefits that were not collected--"lost" wages and benefits--were estimated from the detailed analysis of samples of reported and unreported insolvencies with 25 or more employees at the time of insolvency. These samples consisted of 22 reported and 18 unreported insolvencies. Trustees were asked to provide estimates of lost wages and vacation pay and of total realizations of assets, both with and without the inclusion of real property. Reasonably complete information was obtained for 17 of the reported insolvencies and for 14 of the unreported insolvencies.

The information on lost wages and vacation pay was combined with estimated employment (from Ministry records for reported insolvencies, from WCB records for unreported insolvencies) to estimate the proportions of workers with lost wages and vacation pay and the average amounts lost, which in turn provided the basis for estimating lost wages and vacation pay in all insolvencies that occurred during the twelve-month study period.

Trustees and receivers generally had no knowledge of amounts of outstanding termination pay or severance pay. As claims for these benefits were rarely paid, however, it was assumed that the amounts of these benefits that were lost were the same as the amounts outstanding, whose estimation was described earlier in this section.

The information supplied by trustees and receivers on realizations of assets for the samples of reported and unreported insolvencies was compared to the amounts outstanding and lost in these cases to assess the potential effectiveness of superpriority options.

Future Losses of Wages and Benefits in Insolvencies

In order to provide a rough indication of how annual losses of wages and benefits might change in the future, the estimates derived for the study period April 1, 1982 to March 31, 1983 were scaled in proportion to the numbers of Ontario business bankruptcies that occurred in each of the years between 1977 and 1984. Assuming that annual losses of wages and benefits are approximately proportional to the total annual number of Ontario business bankruptcies, this shows approximately how large losses during the study period would have been had bankruptcy rates been at each of the annual levels experienced since 1977. While these results cannot be extrapolated into the future, they suggest that it is unlikely that, over the next few years, losses will approach the levels experience during the 1982-1983 study period.

SECTION 3
ANALYSIS OF INSOLVENCIES REPORTED TO MINISTRY OF LABOUR

As explained in Section 2, the estimates of unpaid wages and benefits derived from Ministry records are for amounts outstanding at the time that the audit was begun by the Ministry, and the amounts of outstanding wages and benefits that eventually were paid were in some cases larger than what is recorded in Ministry records as the total amount collected. The reader is cautioned, therefore, that the statistics on amounts collected that are presented in this section underestimate actual collections. Better estimates of collections are given in Section 4.

Analysis of Summary Records of Insolvencies

The findings of the analysis of the summary records of insolvent firms are summarized in Exhibits 1 through 8. The first four group the insolvencies by type of business, for bankruptcies (Exhibit 1), receiverships (Exhibit 2), other insolvencies (Exhibit 3), and all insolvencies (Exhibit 4); Exhibits 5-8 provide a similar analysis for firms grouped by size. A finer breakdown of these results--by size of firm for each firm type, for bankruptcies, receiverships, other insolvencies and all insolvencies--is given in Exhibits A-1 through A-4 in Appendix A.

It is easiest to explain the content of these tables by example. Consider Exhibit 1, in which bankruptcies are summarized by type of firm. Referring to the first row, it is seen that 41 firms classified as "service" companies (under the heading "TOTAL"), employed a total of 762 employees who were owed wages or benefits totalling $652,782. Hence, the average number of employees owed monies per "service" firm was 19 and the

EXHIBIT 1

Analysis of Wage Claims Investigated by Ministry of Labour
Between April 1, 1982 and March 31, 1983
Summarized by Industry Group
Bankruptcies

	VACATION PAY					TERM. PAY			SEVERANCE PAY					UNPAID WAGES			TOTAL					COLLECTED	
	Num Cpy	Employees Total	Employees Avg	Amount Total	Due Avg	Num Cpy	Employees Total	Employees Avg	Num Cpy	Employees Total	Employees Avg	Amount Total	Due Avg	Num Cpy	Employees Total	Employees Avg	Num Cpy	Employees Total	Employees Avg	Amount Total	Due Avg	Amount Total	Col Avg
• Service	39	752	19	167147	222	17	373	22	1	39	39	91578	2348	23	209	9	41	762	19	652782	857	12063	16
• Retail	46	1252	27	543582	431	18	724	40	4	322	80	1061398	3296	27	154	6	47	1366	29	2684046	1965	61928	45
• Construction	14	122	9	23299	191	7	43	6	0	0	0	0	0	9	81	9	15	131	9	145190	1108	0	0
• Financial	3	2	1	4088	2044	4	3	1	0	0	0	0	0	4	3	1	4	3	1	19200	6400	0	0
◦ Transport	2	9	4	3136	348	1	1	1	0	0	0	0	0	1	6	6	2	15	8	6011	401	0	0
• Manufacturing	54	2671	49	1029395	385	35	1128	32	10	331	33	1197384	3617	28	575	21	58	2702	47	3989277	1476	377982	140
• Government & Non-Profit	1	11	11	2566	233	1	4	4	0	0	0	0	0	1	10	10	1	11	11	7475	680	0	0
• Other	12	266	22	74277	279	8	233	29	1	15	15	36466	2431	9	222	25	12	271	23	543607	2006	56613	209
	171	5097	30	1847870	363	91	2507	28	16	707	44	2386828	3376	102	1260	12	180	5261	29	8047588	1530	508586	97

EXHIBIT 2

Analysis of Wage Claims Investigated by Ministry of Labour
Between April 1, 1982 and March 31, 1983
Summarized by Industry Group
Receiverships

VACATION PAY					TERM. PAY			SEVERANCE PAY					UNPAID WAGES			TOTAL					COLLECTED	
Num Cpy	Employees Total	Avg	Amount Total	Due Avg	Num Cpy	Employees Total	Avg	Num Cpy	Employees Total	Avg	Amount Total	Due Avg	Num Cpy	Employees Total	Avg	Num Cpy	Employees Total	Avg	Amount Total	Due Avg	Amount Total	Col Avg
* Service																						
34	567	17	91435	161	13	131	10	0	0	0	0	0	29	178	6	36	610	17	256528	421	9958	16
* Retail																						
29	394	14	161171	409	17	137	8	0	0	0	0	0	19	93	5	30	407	14	352889	867	28288	69
* Construction																						
16	425	27	73005	172	9	181	20	0	0	0	0	0	11	84	8	20	435	22	351374	808	13194	30
* Financial																						
1	1	1	114	114	0	0	0	0	0	0	0	0	1	1	1	1	1	1	464	464	0	0
* Transport																						
2	91	46	5840	64	0	0	0	0	0	0	0	0	1	90	90	2	91	46	19018	209	0	0
* Manufacturing																						
79	4729	60	1485415	314	38	1571	41	8	409	51	1208995	2956	38	1119	29	84	5332	63	6431215	1206	121688	23
* Forestry & Mining																						
3	46	15	9231	201	1	23	23	0	0	0	0	0	2	22	11	3	46	15	50658	1101	0	0
* Other																						
14	347	25	204017	588	7	205	29	1	102	102	549542	5388	13	243	19	15	358	24	1533111	4282	900858	2516
178	6600	37	2030228	308	85	2248	26	9	511	57	1758537	3442	114	1830	16	191	7280	38	[illegible]5258	1236	1073778	147

EXHIBIT 3

Analysis of Wage Claims Investigated by Ministry of Labour
Between April 1, 1982 and March 31, 1983
Summarized by Industry Group
Other Insolvencies

VACATION PAY					TERM. PAY			SEVERANCE PAY					UNPAID WAGES			TOTAL					COLLECTED	
Num Cpy	Employees Total	Avg	Amount Total	Due Avg	Num Cpy	Employees Total	Avg	Num Cpy	Employees Total	Avg	Amount Total	Due Avg	Num Cpy	Employees Total	Avg	Num Cpy	Employees Total	Avg	Amount Total	Due Avg	Amount Total	Col Avg
• Service																						
414	2951	7	311817	106	158	992	6	0	0	0	0	0	326	2275	7	448	3276	7	1614234	493	105437	32
• Retail																						
203	818	4	136028	166	87	297	3	3	222	74	879281	3961	134	380	3	219	1037	5	1316113	1269	19062	18
• Construction																						
169	770	5	80704	105	6	22	4	3	69	23	182177	2640	137	395	3	185	879	5	571573	650	0	0
• Agriculture																						
6	6	1	2447	408	0	0	0	0	0	0	0	0	3	3	1	6	6	1	2550	425	0	0
• Financial																						
3	6	2	78	13	0	0	0	0	0	0	0	0	3	6	2	3	6	2	1897	316	0	0
• Transport																						
34	184	5	7629	41	0	0	0	0	0	0	0	0	19	27	1	34	531	16	66511	125	0	0
• Manufacturing																						
193	1490	8	514788	345	90	1228	14	9	403	45	1664752	4131	144	819	6	203	1721	8	5140306	2987	17711	10
• Forestry & Mining																						
22	80	4	22481	281	0	0	0	0	0	0	0	0	16	24	2	25	183	7	39619	216	0	0
• Government & Non-Profit																						
9	75	8	34542	461	3	69	23	0	0	0	0	0	0	0	0	9	75	8	44126	588	21029	280
• Other																						
49	777	16	107602	138	25	517	21	3	44	15	31707	721	43	514	12	59	795	13	444671	559	11438	14
1102	7158	6	1218116	170	367	3133	9	18	738	41	2757917	3737	825	4443	5	1191	8509	7	9241600	1086	174677	21

EXHIBIT 4

Analysis of Wage Claims Investigated by Ministry of Labour
Between April 1, 1982 and March 31, 1983
Summarized by Industry Group
All Insolvencies

	VACATION PAY					TERM. PAY			SEVERANCE PAY					UNPAID WAGES			TOTAL					COLLECTED	
	Num Cpy	Employees Total	Avg	Amount Total	Due Avg	Num Cpy	Employees Total	Avg	Num Cpy	Employees Total	Avg	Amount Total	Due Avg	Num Cpy	Employees Total	Avg	Num Cpy	Employees Total	Avg	Amount Total	Due Avg	Amount Total	Col Avg
• Service	487	4270	9	570399	134	185	1495	8	1	39	39	91578	2348	377	2680	7	525	4648	9	2523544	543	128488	28
• Retail	279	2475	9	840759	340	122	1158	9	7	544	78	1940679	3567	180	637	4	298	2810	9	4353048	1549	109258	39
• Construction	199	1317	7	177008	134	22	246	11	3	69	23	182177	2640	157	550	4	220	1445	7	1068137	739	13194	9
• Agriculture	6	6	1	2447	408	0	0	0	0	0	0	0	0	3	3	1	6	6	1	2550	425	0	0
• Financial	7	9	1	4281	476	4	3	1	0	0	0	0	0	9	10	1	9	10	1	21561	2156	0	0
• Transport	38	284	7	16604	58	1	1	1	0	0	0	0	0	21	123	6	38	637	17	91540	144	0	0
• Manufacturing	326	8880	27	3029590	341	163	3932	24	27	1143	42	4071131	3562	210	2513	12	345	9755	28	15560798	1595	516361	53
• Forestry & Mining	25	126	5	31722	252	1	23	23	0	0	0	0	0	18	56	3	28	229	8	90278	394	0	0
• Government & Non-Profit	10	86	9	37108	431	4	73	18	0	0	0	0	0	1	10	10	10	86	9	51601	600	21029	245
• Other	75	1392	19	388298	279	40	955	24	5	161	32	617817	3837	65	979	15	86	1424	17	2521389	1771	968709	680
	1451	18865	13	5098214	270	543	7886	15	43	1956	45	6903382	3529	1041	7561	7	1562	21050	13	26284446	1249	1757039	83

average amount owed per employee having a claim was $857. The average amount collected per employee having a claim was only $16. Of these 762 employees, 752 (in 39 of the 41 companies) were owed vacation pay totalling $167,147 and 39 (in one company) were owed severance pay totalling $91,578. In addition, 373 employees in 17 firms and 209 employees in 23 firms were owed unspecified amounts of termination pay and unpaid wages, respectively.

It will be shown later in this section that the amounts given in these tables for vacation pay and total claims are reasonably close to the corresponding estimates derived an analysis of a random sample of employees drawn from these firms. These tables therefore provide a reasonably accurate picture of wages owed employees of the 1,562 insolvencies for which a claim was made to the Ministry during the twelve-month period chosen for analysis.

An examination of Exhibit 4, which gives a breakdown by type of firm for all insolvencies, shows that:

- of all employees owed wages or benefits, 90% were owed vacation pay, 37% were owed termination pay, 9% were owed severance pay and 36% were owed unpaid wages;

- approximately 60% the total amount owed was to employees of manufacturing firms;

- nearly one-half of employees with claims were employed by manufacturing firms; and

- average total claims per employee were highest for financial firms, "other" firms, retail businesses and manufacturing companies.

Inferences concerning the relative importance of the different benefit components are made later in this section, on the basis of results of the analysis of the employee sample.

EXHIBIT 5

Analysis of Wage Claims Investigated by Ministry of Labour
Between April 1, 1982 and March 31, 1983
Summarized by Size of Firm
Bankruptcies

VACATION PAY					TERM. PAY			SEVERANCE PAY					UNPAID WAGES			TOTAL					COLLECTED	
Num Cpy	Employees Total	Employees Avg	Amount Total	Due Avg	Num Cpy	Employees Total	Employees Avg	Num Cpy	Employees Total	Employees Avg	Amount Total	Due Avg	Num Cpy	Employees Total	Employees Avg	Num Cpy	Employees Total	Employees Avg	Amount Total	Due Avg	Amount Total	Col Avg
* 0 to 9 employees																						
95	249	3	65608	263	46	78	2	0	0	0	0	0	68	153	2	102	279	3	251415	901	2900	10
* 10 to 24 employees																						
27	451	17	124491	276	16	217	14	1	21	21	77435	3687	11	120	11	29	483	17	410747	850	39912	83
* 25 to 49 employees																						
20	695	35	255760	368	10	283	28	1	28	28	96197	3436	10	238	24	20	700	35	615740	880	92585	132
* 50 to 99 employees																						
13	962	74	313620	326	9	562	62	4	111	28	453173	4083	7	373	53	13	962	74	1629164	1694	92578	96
* 100 to 199 employees																						
14	2027	145	771822	381	9	1128	125	9	407	45	1354345	3328	5	347	69	14	2103	150	3988183	1896	56813	27
* 200 or more employees																						
2	713	356	316569	444	1	263	263	1	140	140	405676	2898	1	29	29	2	734	367	1152339	1570	223889	305
171	5097	30	1847870	363	91	2507	28	16	707	44	2386828	3376	102	1260	12	180	5261	29	8047588	1530	508585	97

EXHIBIT 6

Analysis of Wage Claims Investigated by Ministry of Labour
Between April 1, 1982 and March 31, 1983
Summarized by Size of Firm
Receiverships

VACATION PAY					TERM. PAY			SEVERANCE PAY					UNPAID WAGES			TOTAL					COLLECTED	
Num Cpy	Employees Total	Avg	Amount Total	Due Avg	Num Cpy	Employees Total	Avg	Num Cpy	Employees Total	Avg	Amount Total	Due Avg	Num Cpy	Employees Total	Avg	Num Cpy	Employees Total	Avg	Amount Total	Due Avg	Amount Total	Col Avg
0 to 9 employees																						
78	236	3	89932	381	35	91	3	0	0	0	0	0	69	171	2	90	282	3	345856	1226	31454	112
10 to 24 employees																						
35	544	16	131742	242	20	228	11	0	0	0	0	0	22	184	8	35	582	17	416787	716	15333	26
25 to 49 employees																						
29	995	34	354005	356	13	315	24	0	0	0	0	0	11	274	25	29	995	34	758394	762	31114	31
50 to 99 employees																						
20	1345	67	354322	263	9	394	44	4	153	38	848438	5546	6	233	39	21	1484	71	2060744	1379	0	0
100 to 199 employees																						
8	1217	152	619857	509	4	553	138	3	158	53	719863	4557	5	513	103	8	1222	153	2871225	2350	995875	815
200 or more employees																						
8	2263	283	480370	212	4	669	167	2	200	100	190228	951	1	453	453	8	2705	338	2542252	940	0	0
178	6600	37	2030228	308	85	2248	26	9	511	57	1758637	3442	114	1828	16	191	7270	38	8995258	1236	1073776	147

EXHIBIT 7

Analysis of Wage Claims Investigated by Ministry of Labour
Between April 1, 1982 and March 31, 1983
Summarized by Size of Firm
Other Insolvencies

VACATION PAY					TERM. PAY			SEVERANCE PAY					UNPAID WAGES			TOTAL					COLLECTED	
Num Cpy	Employees Total	Avg	Amount Total	Due Avg	Num Cpy	Employees Total	Avg	Num Cpy	Employees Total	Avg	Amount Total	Due Avg	Num Cpy	Employees Total	Avg	Num Cpy	Employees Total	Avg	Amount Total	Due Avg	Amount Total	Col Avg
* 0 to 9 employees																						
898	1957	2	346466	177	253	415	2	0	0	0	0	0	664	1377	2	973	2092	2	1311766	627	32947	16
* 10 to 24 employees																						
136	1963	14	313729	160	71	746	11	3	69	23	192177	2840	108	1198	11	144	2129	15	1481110	696	37471	18
* 25 to 49 employees																						
34	981	29	116175	118	18	403	22	0	0	0	0	0	28	421	15	34	1100	32	702782	639	15186	14
* 50 to 99 employees																						
25	1442	58	327510	227	19	788	41	9	519	58	2187916	4235	22	1094	50	31	2029	65	4342259	2140	89073	44
* 100 to 199 employees																						
9	815	91	114236	140	6	781	130	6	150	25	377824	2519	3	353	118	9	1158	129	1403708	1211	0	0
1102	7158	6	1218116	170	367	3133	9	18	738	41	2757917	3737	825	4443	5	1191	8508	7	9241625	1086	174677	21

EXHIBIT 8

Analysis of Wage Claims Investigated by Ministry of Labour
Between April 1, 1982 and March 31, 1983
Summarized by Size of Firm
All Insolvencies

VACATION PAY					TERM. PAY			SEVERANCE PAY					UNPAID WAGES			TOTAL					COLLECTED	
Num Cpy	Employees Total	Avg	Amount Total	Due Avg	Num Cpy	Employees Total	Avg	Num Cpy	Employees Total	Avg	Amount Total	Due Avg	Num Cpy	Employees Total	Avg	Num Cpy	Employees Total	Avg	Amount Total	Due Avg	Amount Total	Col Avg
* 0 to 9 employees																						
1079	2442	2	502008	206	334	582	2	0	0	0	0	0	801	1701	2	1165	2653	2	1909037	720	67301	25
* 10 to 24 employees																						
200	2958	15	588952	199	107	1169	11	4	90	22	259612	2885	141	1512	11	208	3184	15	2300844	723	92716	29
* 25 to 49 employees																						
83	2671	32	725840	272	41	981	24	1	29	29	99187	3436	49	933	19	83	2795	34	2076896	743	138986	50
* 50 to 99 employees																						
58	3748	65	886462	236	37	1744	47	17	783	46	3489527	4459	35	1700	49	65	4485	69	8032187	1791	181749	41
* 100 to 199 employees																						
31	4059	131	1505915	371	19	2450	129	18	715	40	2452132	3430	13	1213	93	31	4484	145	8263111	1843	1052488	235
* 200 or more employees																						
10	2976	298	796839	268	5	932	186	3	340	113	595914	1753	2	482	241	10	3438	344	3694591	1074	223899	65
1461	18855	13	5098214	270	543	7898	15	43	1958	45	6903382	3526	1041	7541	7	1532	21050	13	26284446	1249	1757039	83

Comparing Exhibits 1, 2 and 3 to Exhibit 4, it is evident amounts that the findings listed above generally apply to bankruptcies, receiverships and other insolvencies.

Consider now the relationships between amounts outstanding and size of firm, which are displayed in Exhibits 5-8. Exhibit 8 shows that, for all insolvencies taken together:

- average amounts outstanding were significantly higher among firms having 50 or more employees with claims than among smaller firms;

- approximately three-quarters of total claims were among firms having 50 or more employees; almost one-half of the total was among firms having 100 or more employees; and

- average amounts outstanding per employee for vacation pay and severance pay tended to increase with the size of the company, except for companies with 200 or more employees with amounts due, where the averages were comparable to those of smaller companies.

Analysis of Employee Sample

The results of the analysis of the stratified random sample of 617 employees are summarized in Exhibits 9, 10 and 11. These exhibits provide breakdowns by type of insolvency, type of firm and size of firm, respectively.

Exhibit 9 shows that the estimate of the total amount outstanding among all reported insolvencies was $28.4 million. Of this, unpaid wages accounted for 21%, vacation pay accounted for 22%, termination pay made up 35%, and the remaining 22% was in severance pay. (As noted in Section 2, these amounts do not include fringe benefits owed, which are believed to be relatively small.) According to Ministry records, approximately $3.1 million of the $28.4 million owed was collected (about 11%).

EXHIBIT 9

Estimated Amounts Outstanding and Collected In Reported Insolvencies, by Type of Insolvency

Bankruptcies

Pay Component	Number of Workers	Samp. Size	Avg. Amount	Std. Err.	Est. Total	Std. Dev.
Unpaid Wages	1,260	87	335	42	422,567	52,644
Vacation Pay	5,097	189	381	39	1,942,227	199,952
Termination Pay	2,507	146	1,414	68	3,545,047	171,079
Severance Pay	707	60	3,825	688	2,703,922	486,686
Amount Collected	1,506	83	215	24	323,045	36,007
Gross Amount Due	**5,261**	**193**	**1,637**	**106**	**8,613,763**	**555,773**

Receiverships

Pay Component	Number of Workers	Samp. Size	Avg. Amount	Std. Err.	Est. Total	Std. Dev.
Unpaid Wages	1,838	126	1,461	186	2,685,323	341,157
Vacation Pay	6,600	316	387	33	2,553,901	216,744
Termination Pay	2,248	103	1,571	110	3,531,084	247,493
Severance Pay	511	51	2,558	322	1,307,330	164,597
Amount Collected	3,032	111	513	76	1,556,739	231,567
Gross Amount Due	**7,280**	**335**	**1,384**	**69**	**10,077,638**	**501,708**

Other Insolvencies

Pay Component	Number of Workers	Samp. Size	Avg. Amount	Std. Err.	Est. Total	Std. Dev.
Unpaid Wages	4,443	52	647	27	2,873,942	117,768
Vacation Pay	7,158	75	225	35	1,613,724	253,370
Termination Pay	3,133	54	946	91	2,963,695	284,280
Severance Pay	738	25	3,043	398	2,245,507	293,880
Amount Collected	2,603	2	470	0	1,223,736	0
Gross Amount Due	**8,509**	**89**	**1,140**	**58**	**9,696,868**	**495,223**

All Insolvencies

Pay Component	Number of Workers	Samp. Size	Avg. Amount	Std. Err.	Est. Total	Std. Dev.
Unpaid Wages	7,541	265	793	48	5,981,833	364,731
Vacation Pay	18,855	580	324	21	6,109,852	388,787
Termination Pay	7,888	303	1,273	52	10,039,825	413,927
Severance Pay	1,956	136	3,199	303	6,256,759	591,879
Amount Collected	7,140	196	435	33	3,103,520	234,350
Gross Amount Due	**21,050**	**617**	**1,349**	**43**	**28,388,268**	**897,686**

This table also shows that the average amount outstanding per employee was lowest for vacation pay ($324) and highest, by far, for severance pay ($3,199). It was estimated that about 34% of the employees owed monies collected something, and workers in this group collected an average of $435.

The standard deviations of the estimated totals are shown in the last column of this table. The standard errors of the means (i.e., the standard deviations of the estimated means) are given as well. As the distributions of the estimators of the totals and means are approximately normal, there is about a 95% chance that the estimates will be within two standard deviations of the actual values. It follows that there is about a 95% chance that the actual total amount owed is between $26.6 million ($28.4 - 2 x $0.9) and $30.2 million ($28.4 + 2 x $0.9). A corresponding confidence interval for the average total amount owed per employee is $1,263 to $1,435. For the purposes of this analysis, this degree of statistical accuracy would seem to be quite satisfactory.

These estimates of total amounts owed and the total amount collected may be compared with the corresponding totals given in Exhibit 4. In Exhibit 9, total vacation and severance pay are estimated to be $6.1 and $6.3 million, respectively. Exhibit 4 puts these amounts at $5.1 and $6.9, respectively. As was explained in Section 2, it was expected that the estimate derived from the sample for total vacation pay owed would be somewhat higher than the amount shown in the Ministry's summary records. The difference in the two totals of severance pay owed is about one standard deviation of the total estimated from the sample and therefore can be attributable to statistical variation.

The estimate of the total amount collected from the employee sample ($3.1 million) significantly exceeds the amount shown in the Ministry's summary records ($1.8 million). The apparent reason for this difference is that the amount shown as collected in the Ministry's summary records reflects the amounts collected due to the efforts of the Ministry, and may not include some payments made directly to the employees by trustees and receivers which were recorded in the employee sample. As noted in Section 2 and again at the beginning of this section, even the estimates of amounts collected based on the employee sample underestimate actual collections.

The estimate of the total amount outstanding from the employee sample ($28.4 million) was about $2.1 million more than the total amount indicated from the Ministry's summary statistics. As in the case of vacation pay, this result was expected.

Exhibits 9 shows how the estimates differed by type of insolvency. Some 25% of the employees with amounts outstanding were involved in bankruptcies, whereas about 35% were in receiverships and the remaining 40% were in other insolvencies. Note that average amounts outstanding were higher in bankruptcies for all wage items except unpaid wages, where they were significantly lower. Average amounts collected were considerably smaller in bankruptcies than in other insolvencies.

Differences by type of company are shown in Exhibits 10. The eleven categories of firms given earlier are here reduced to three. Manufacturing and service firms consist of the same companies that formerly were designated by these terms; "other firms" here consist of all firms from the remaining eight categories used earlier.

Note that the totals shown in Table 10, for all insolvencies, are somewhat different than those shown in Table 9. The reason for this discrepancy was explained in Section 2. The totals in Table 11 (for the breakdown by size of firm) also differ somewhat.

Exhibit 10 shows that of the estimated total amount outstanding, 57% was owed to employees of manufacturing firms, 12% was owed to employees of service-related companies and the balance of 31% was owed to employees of other types of firms. Average wage claims and average amounts collected were smallest

EXHIBIT 10

Estimated Amounts Outstanding and Collected In Reported Insolvencies, by Type of Company

Manufacturing Companies

Pay Component	Number of Workers	Samp. Size	Avg. Amount	Std. Err.	Est. Total	Std. Dev.
Unpaid Wages	2,513	125	1,131	110	2,842,395	277,184
Vacation Pay	8,890	357	423	29	3,759,280	258,797
Termination Pay	3,933	168	1,486	74	5,843,410	290,605
Severance Pay	1,143	50	2,917	413	3,333,622	472,466
Amount Collected	5,056	75	494	44	2,499,660	221,972
Gross Amount Due	**9,755**	**378**	**1,617**	**69**	**15,778,706**	**671,924**

Service Companies

Pay Component	Number of Workers	Samp. Size	Avg. Amount	Std. Err.	Est. Total	Std. Dev.
Unpaid Wages	2,660	24	627	26	1,668,680	68,668
Vacation Pay	4,270	30	103	27	441,284	116,686
Termination Pay	1,496	16	865	191	1,293,903	285,739
Severance Pay	39	0	0	0	0	0
Amount Collected	371	1	64	0	23,750	0
Gross Amount Due	**4,648**	**33**	**732**	**68**	**3,403,867**	**316,193**

Other Companies

Pay Component	Number of Workers	Samp. Size	Avg. Amount	Std. Err.	Est. Total	Std. Dev.
Unpaid Wages	2,368	116	556	31	1,317,386	73,359
Vacation Pay	5,695	193	320	44	1,820,040	253,065
Termination Pay	2,459	119	1,137	57	2,795,722	140,735
Severance Pay	774	86	3,584	374	2,773,981	289,146
Amount Collected	1,671	120	345	35	576,149	59,264
Gross Amount Due	**6,647**	**206**	**1,310**	**63**	**8,707,129**	**415,735**

All Insolvencies

Pay Component	Number of Workers	Samp. Size	Avg. Amount	Std. Err.	Est. Total	Std. Dev.
Unpaid Wages	7,541	265	773	39	5,828,461	294,836
Vacation Pay	18,855	580	319	20	6,020,604	380,307
Termination Pay	7,888	303	1,259	55	9,933,034	431,167
Severance Pay	1,956	136	3,122	283	6,107,603	553,922
Amount Collected	7,098	196	437	32	3,099,559	229,747
Gross Amount Due	**21,050**	**617**	**1,325**	**40**	**27,889,700**	**851,055**

EXHIBIT 11

Estimated Amounts Outstanding and Collected In Reported Insolvencies, by Size of Company

Companies With 1-49 Employees

Pay Component	Number of Workers	Samp. Size	Avg. Amount	Std. Err.	Est. Total	Std. Dev.
Unpaid Wages	4,146	54	680	31	2,819,333	130,158
Vacation Pay	8,071	97	290	33	2,337,126	262,571
Termination Pay	2,752	46	828	140	2,279,376	386,170
Severance Pay	118	4	1,832	0	216,167	0
Amount Collected	3,093	6	452	22	1,398,446	69,457
Gross Amount Due	**8,642**	**103**	**885**	**56**	**7,652,002**	**484,781**

Companies With 50-199 Employees

Pay Component	Number of Workers	Samp. Size	Avg. Amount	Std. Err.	Est. Total	Std. Dev.
Unpaid Wages	2,913	187	1,266	132	3,686,758	383,530
Vacation Pay	7,808	366	320	26	2,498,651	205,102
Termination Pay	4,204	202	1,513	49	6,359,730	207,509
Severance Pay	1,498	113	3,311	340	4,960,325	509,876
Amount Collected	2,007	113	349	24	700,321	48,099
Gross Amount Due	**8,969**	**394**	**1,952**	**78**	**17,505,462**	**701,567**

Companies With 200 or More Employees

Pay Component	Number of Workers	Samp. Size	Avg. Amount	Std. Err.	Est. Total	Std. Dev.
Unpaid Wages	482	24	79	10	38,160	4,956
Vacation Pay	2,976	117	443	67	1,319,030	198,543
Termination Pay	932	55	1,478	184	1,377,423	171,905
Severance Pay	340	19	3,118	504	1,060,252	171,376
Amount Collected	3,006	77	527	113	1,584,770	340,517
Gross Amount Due	**3,439**	**120**	**1,103**	**91**	**3,794,865**	**313,632**

All Insolvencies

Pay Component	Number of Workers	Samp. Size	Avg. Amount	Std. Err.	Est. Total	Std. Dev.
Unpaid Wages	7,541	265	868	54	6,544,251	405,044
Vacation Pay	18,855	580	326	21	6,154,806	387,853
Termination Pay	7,888	303	1,270	60	10,016,529	470,891
Severance Pay	1,956	136	3,189	275	6,236,743	537,907
Amount Collected	8,105	196	454	43	3,683,537	350,842
Gross Amount Due	**21,050**	**617**	**1,375**	**43**	**28,952,328**	**908,610**

for service industries. Average termination pay and average unpaid wages were highest for manufacturing firms; average severance pay was highest for "other" firms.

Similarly, differences by size of firms are shown in Exhibit 11. Of the estimated total amount outstanding, 27% was due employees of companies with 1-49 employees, 60% was due employees of firms having 50-199 employees and the balance of 13% was due employees of companies having 200 or more employees.

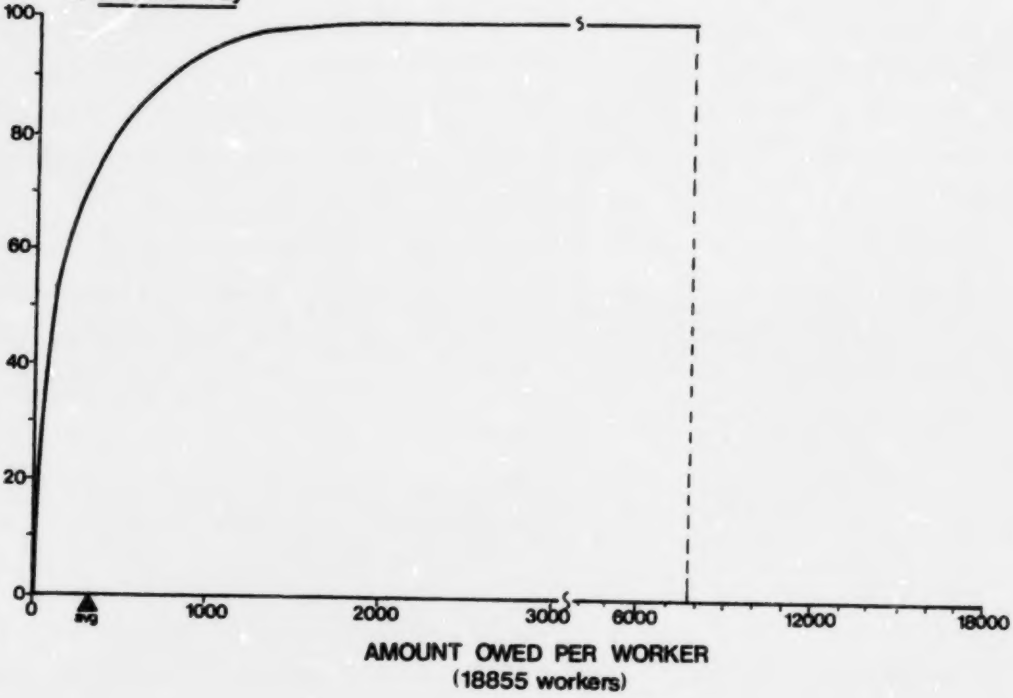
In keeping with the results reported earlier, average amounts outstanding were largest for the medium-size firms, having 50-199 employees. Surprisingly, average unpaid wages was much smaller for firms with 200 or more employees than for smaller firms.

In addition to average and total amounts outstanding and collected, estimates were made of the cumulative distributions of amounts outstanding and amounts collected per employee. These are shown in Exhibit 12 for all insolvencies. These distributions are useful in estimating the cost and effectiveness of proposals to recompense workers up to specified maximum amounts or to establish minimum deductible amounts.

Exhibit 12e is the cumulative distribution of the total amount outstanding per employee. The arrow on the horizontal axis points to the average amount owed, which is $1,349. (Note that this amount is given in Exhibit 9.) This distribution shows, for example, that if funds had been established to provided a maximum payment of $5,000 per worker owed wages and benefits, it would fully recompense approximately 92% of workers having claims. The remaining 8% would have total claims of between $5,000 and $18,000. (The total claims of this 8% of workers could be estimated from this information.) Similarly, this distribution shows that if the fund had a minimum deductible amount of $400, some 53% of workers with wage claims would not be recompensed at all.

EXHIBIT 12

Cumulative Distributions of Wages and Wage Benefits Owed per Worker for All Insolvencies


a) Vacation Pay

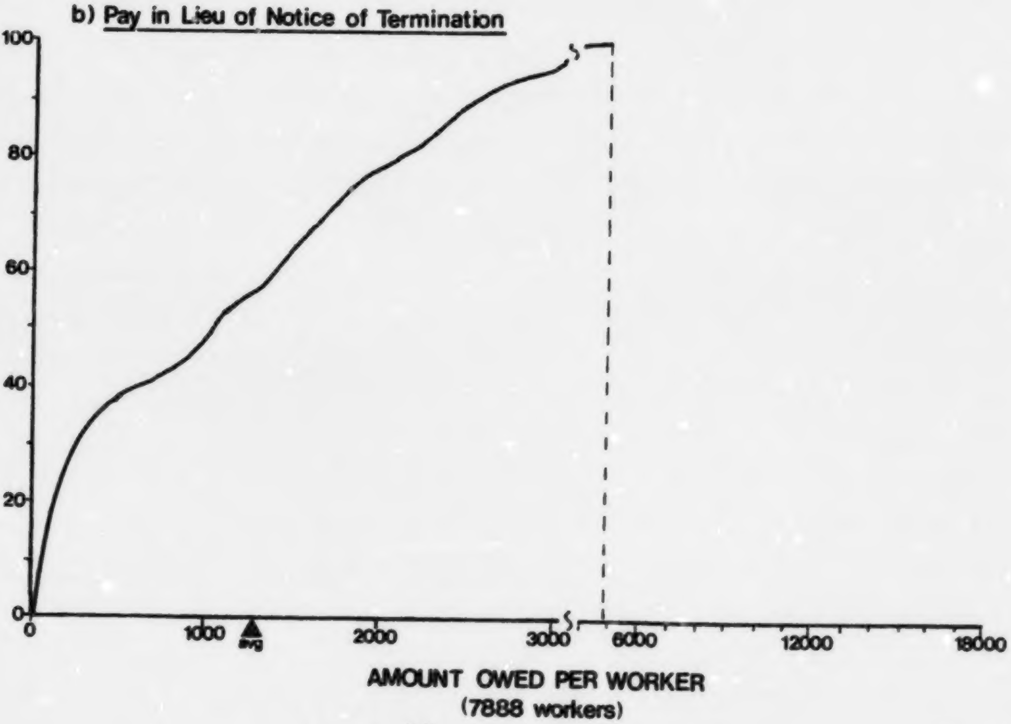

b) Pay in Lieu of Notice of Termination

EXHIBIT 12 (cont.)

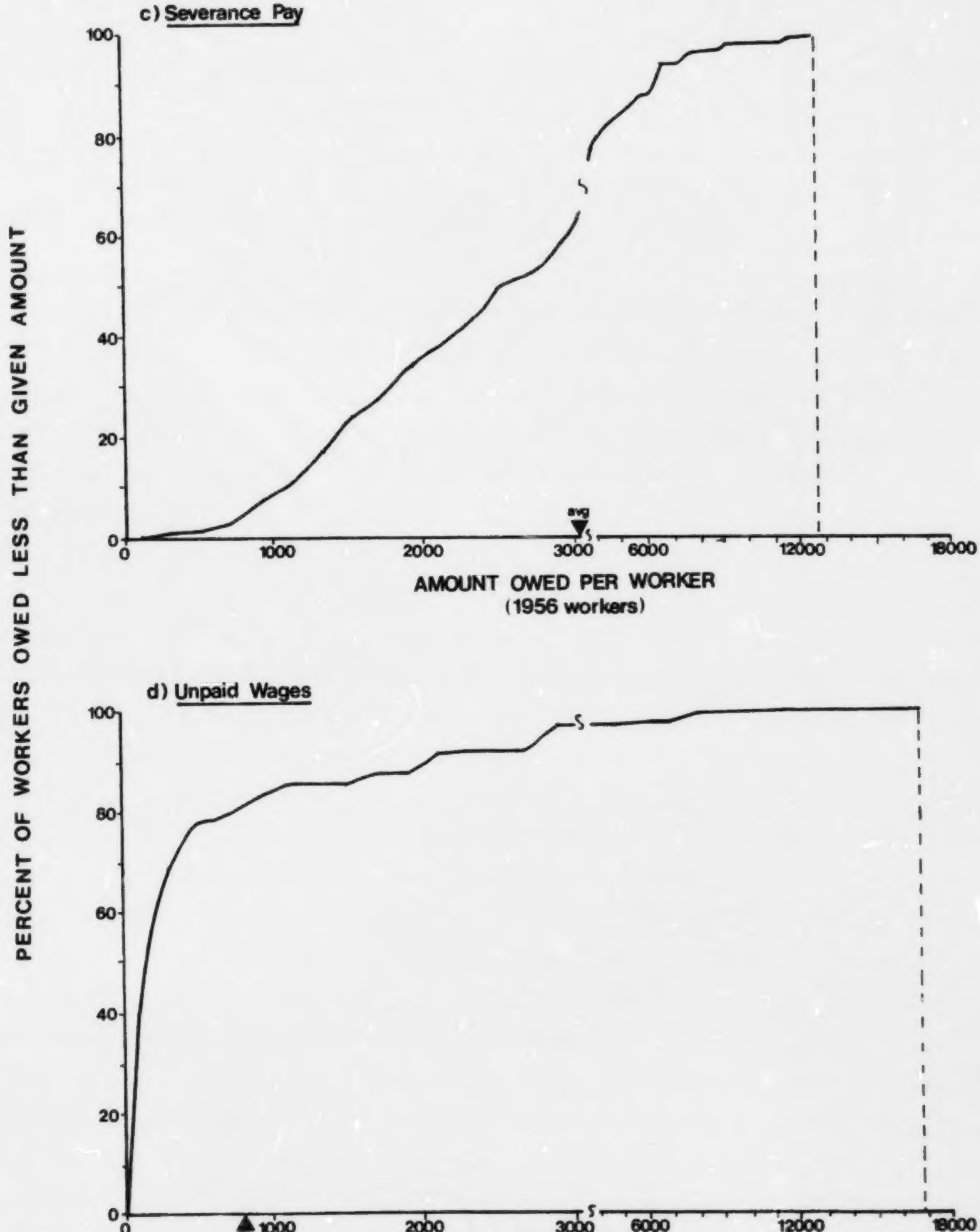
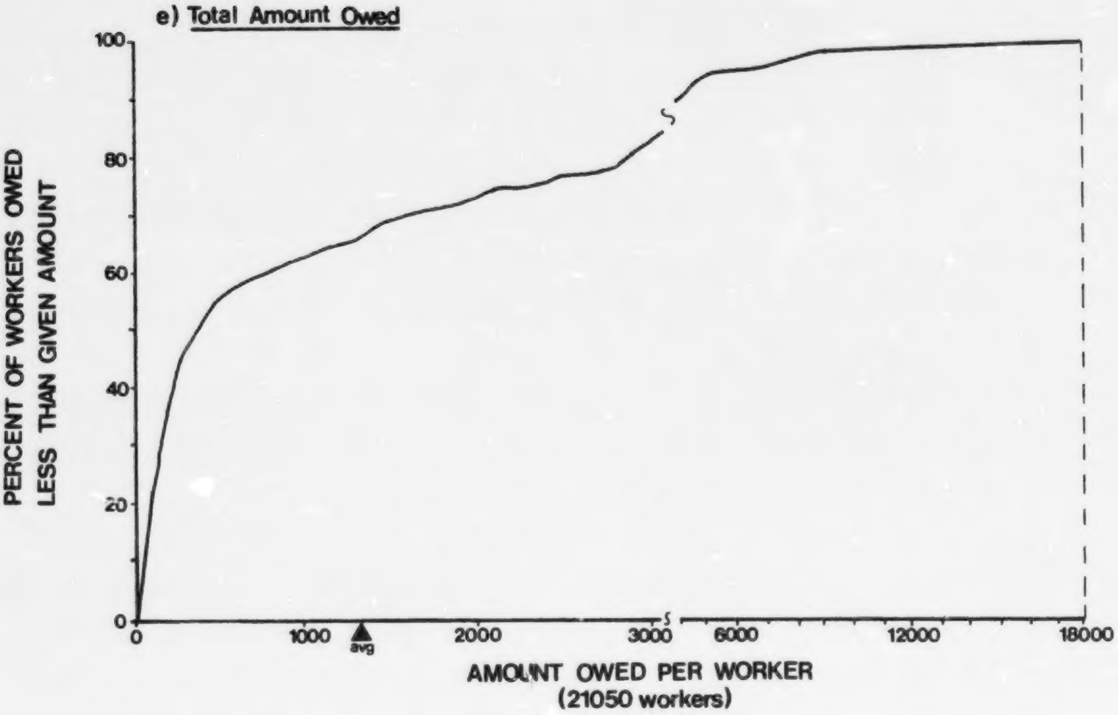


EXHIBIT 12 (cont.)



These distributions of amounts outstanding and collected could also be used to estimate the total cost of administering a fund or insurance scheme, depending on the overall claim rate (which would depend largely, of course, on the state of the general economy) and on specific provisions of the plan, such as maximums and minimums.

SECTION 4

ANALYSIS OF UNREPORTED INSOLVENCIES AND ESTIMATION OF OUTSTANDING AND LOST WAGES AND BENEFITS

Analysis of Unreported Insolvencies

Survey of Ontario Trustees and Receivers

As was explained in Section 2, Ontario trustees and receivers were asked in a survey for the names of companies for which they were appointed trustee or receiver during the twelve -month study period. Ministry records were then searched to determine whether claims had been filed for a sample of the companies identified in this survey. As well, employment information for these companies was obtained from the WCB. This provided a means of estimating the numbers of bankruptcies and other insolvencies which occurred during the twelve-month study period for which no wage claim was made to the Ministry.

Exhibit 13 summarizes the responses from this survey. As shown, 459 insolvencies were identified. The WCB was asked to provide employment information for all of these insolvencies. The WCB had no records for 145 of the companies. While this may have been in part due to differences in names under which companies were listed, most of the companies not listed were very small firms, often family businesses. Of the companies for which the WCB had employment information, 127 had only 1 or 2 employees or were known not to have had outstanding wages or benefits. It was judged unlikely that either of these two groups of insolvencies had made a significant contribution to outstanding wages and

EXHIBIT 13

Summary of Responses to Survey of Ontario Trustees and Receivers Covering Period April 1, 1982 - March 31, 1983

Number of insolvencies identified in survey	459
Number unreported where WCB had no record[1]	145
Number unreported where clearly little outstanding	127
Number possibly with outstanding amounts	187
Number in which claim was filed with Ministry	79
Number unreported possibly with outstanding amounts	108

1. Outstanding wages and benefits assumed to be insignificant for these insolvencies.

EXHIBIT 14

Summary of Insolvencies Identified in Survey of Trustees and Receivers Not Reported to Ministry of Labour in Which There May Have Been Outstanding Wages and Benefits

	Bankruptcies[1]	Receiverships	Total
Nbr. of firms	52	56	108
Nbr. of employees[2]	733	979	1712
Employees/firm (avg.)	14.1	17.5	15.9

1. Includes 14 receiverships forced into bankruptcy employing an estimated 333 workers.

2. Estimates based on Workman's Compensation Board employment data.

benefits. These 275 cases were therefore dropped from further consideration, leaving 187 insolvencies in which there may have been outstanding wages or benefits.

Of these 187 insolvencies, 79 were found to have had claims for wages or benefits filed against them with the Ministry. As noted in Section 2, others may also have had claims filed against them, but were not identified due to differences in the names under which the companies were listed or because the Ministry file had been pulled or for some other reason could not be located when the search was made.

Exhibit 14 shows how the remaining 108 unreported insolvencies were divided between bankruptcies and receiverships, and gives estimated employment. As shown, a little under one-half of these were bankruptcies (including receiverships forced into bankruptcy) and, on average, the bankruptcies had slightly fewer employees (14.1) than did the receiverships (17.5). Average employment was greatest, however, among 14 receiverships forced into bankruptcy, at 23.8 workers per firm.

It should be noted that the WCB data consisted variously of just employment, employment and total annual wages paid or just total annual wages paid, for years since 1981 in which information was available. For those cases where only total wages were given, employment was estimated on the basis of average wages per worker, taken over all firms for which the WCB supplied information on both employment and wages. While it can be expected that actual employment at the time of insolvency may have in some cases differed considerably from the estimates derived from the WCB data, a comparison of the WCB estimates with Ministry records for insolvencies reported to the Ministry (described below, in respect of Exhibit 18) suggests that the WCB employment estimates are satisfactory for estimating total employment among all insolvencies not reported to the Ministry.

Total Number of Insolvencies During Study Period

Estimates of total numbers of Ontario insolvencies which occurred during the twelve-month study period is shown in Exhibit 15. (Recall that "reported" insolvencies are those for which a claim for wages or benefits was filed with the Ministry of Labour; "unreported" insolvencies are those for which no claim was filed.

For each type of insolvency, the ratio of the total number of unreported to reported insolvencies was assumed to be the same as what this ratio was found to be from the survey of trustees and receivers, after removing those cases considered unlikely to have had outstanding wages and benefits. Thus, the number of unreported bankruptcies, receiverships and other insolvencies was estimated to equal the product of the corresponding number of reported insolvencies and the ratio 108/79 = 1.37.

It therefore was estimated that, during the twelve-month study period, there were 3,704 Ontario insolvencies in which there may have been outstanding wages or benefits, of which 2,139 had not been reported to the Ministry. About three-quarters of all insolvencies were "other" insolvencies, with the balance divided almost equally between bankruptcies and receiverships.

A more detailed breakdown of these estimated 3,704 insolvencies is given in Exhibit 16. The numbers of workers with amounts outstanding in reported insolvencies are taken from Exhibit 9 (in Section 2). The results contained in Exhibit 14 for average employment per bankruptcy and per receivership were used to derive estimates for numbers of workers with amounts outstanding in unreported bankruptcies and receiverships. For other insolvencies, average numbers of workers per firm with amounts outstanding were assumed to be the same in unreported insolvencies as in reported insolvencies; this was used to estimate numbers of workers with amounts outstanding for these types of insolvencies.

EXHIBIT 15

Estimated Numbers of Ontario Insolvencies
April 1, 1982 - March 31, 1983

Type of Insolvency	**Reported Insolvencies**	**Unreported Insolvencies**[1]	**All Insolvencies**
Bankruptcies	180	246	426
Receiverships	191	261	452
Other Insolvencies	1,194	1,632	2,826
All Insolvencies	**1,565**	**2,139**	**3,704**

1. Equals number of reported insolvencies multiplied by 108/79.

EXHIBIT 16

Estimated Numbers of Workers With Outstanding Wages or Benefits in Ontario Insolvencies
April 1, 1982 - March 31, 1983

	Number of Insolvencies[1]	Number of Workers[2]	Avg. Number Workers/Firm[3]
Bankruptcies			
- Reported	180	5,261	29.2
- Unreported	246	3,486	14.1
- **Total**	**426**	**8,747**	**20.5**
Receiverships			
- Reported	191	7,280	38.1
- Unreported	261	4,568	17.5
- **Total**	**452**	**11,848**	**26.2**
Other Insolvencies			
- Reported	1,194	8,509	7.1
- Unreported	1,632	11,587	7.1
- **Total**	**2,826**	**20,096**	**7.1**
All Insolvencies			
- Reported	1,565	21,050	13.5
- Unreported	2,139	19,641	9.2
- **Total**	**3,704**	**40,691**	**11.0**

1. From Exhibit 4.

2. For reported insolvencies, from Exhibit 4; for unreported insolvencies, equals product of number of insolvencies and average number of workers per firms with amounts outstanding.

3. For unreported bankruptcies and receiverships, from Exhibit 14; for unreported other insolvencies, assumed to equal amounts for reported other insolvencies.

This exhibit shows that an estimated 41,000 workers may have had outstanding wages or benefits during the study period.

Outstanding Wages and Benefits

Summary statistics on outstanding wages and benefits among reported insolvencies is given in Exhibit 17. As indicated in the footnote to the exhibit, these statistics were derived from information contained in Exhibit 9. These amounts were used to estimate total outstanding wages and benefits, and numbers of workers affected in unreported insolvencies.

Analysis of Sample of Reported Insolvencies

To determine the amounts of outstanding wages and benefits in unreported insolvencies that actually were lost (and for other reasons explained below) all 18 reported insolvencies from the survey of trustees and receivers with 25 or more employees at the time of insolvency were the subject of a follow-up study. The results of this survey are contained in Exhibit 18. As indicated in a footnote to this exhibit, information was not available for four of the 18 cases. Wage losses averaging $300 were found to have been experienced by 26.0% of the workers employed by these firms; vacation pay losses averaged $378 and were experienced by 30.1% of the workers.

Lost Wages and Benefits in Reported Insolvencies

A similar survey of trustees and receivers was done for 22 reported insolvencies from the survey of trustees and receivers with 25 or more employees at the time of insolvency. Seven were from the sample of unreported insolvencies; the remaining 15 comprised a stratified random sample. Information was obtained for 17 of these 22 cases. The results obtained from this survey are given in Exhibit 19.

The first thing to note about this table is that while the WCB and Ministry employment estimates differ markedly for

EXHIBIT 17

Estimated Percentages of Workers In Insolvencies Reported to Ministry of Labour With Outstanding Wages and Benefits and Average Amounts Outstanding April 1, 1982 - March 31, 1983[1]

	Percentage of Workers With Claims	Average Amount Outstanding/Worker
Wages		
- Bankruptcies	23.9%	$ 335
- Receiverships	25.2%	1,461
- Other Insolvencies	52.2%	647
Vacation Pay		
- Bankruptcies	96.9%	381
- Receiverships	90.6%	387
- Other Insolvencies	84.1%	225
Termination Pay		
- Bankruptcies	47.7%	1,414
- Receiverships	30.9%	1,571
- Other Insolvencies	36.8%	946
Severance Pay		
- Bankruptcies	13.4%	3,825
- Receiverships	7.0%	2,558
- Other Insolvencies	8.7%	3,043

1. From Exhibit 9.

EXHIBIT 18

Survey Results for Sample of Ontario Insolvencies Having 25 or More Workers at Time of Insolvency Where No Claim For Wages or Benefits Was Made to Ministry of Labour[1]
April 1, 1982 - March 31, 1983

Insolvencies in Sample[2]	Number of Employees Per WCB	Realizations		Amounts Outstanding	
		Including Real Prop	Excluding Real Prop	Wages	Vac Pay
1. (R)	35	332,000	332,000	0	22,000
2. (R)	25	284,000	51,000	1,500	11,200
3. (B)	56	0	0	0	0
4. (B)	34	25,000	25,000	0	0
5. (R)	47	230,000	230,000	17,000	25,000
6. (R/B)	65	3,500,000	3,000,000	0	0
7. (R)	80	300,000	300,000	0	0
8. (B)	62	500,000	500,000	0	0
9. (R)	54	1,250,000	1,250,000	0	0
10. (R)	50	0	0	0	0
11. (R/B)	97	0	0	0	0
12. (R/B)	147	1,000,000	1,000,000	48,100	39,100
13. (R/B)	33	517,000	517,000	0	0
14. (R)	58	125,000	125,000	0	0
Bankrupt.[3]	494	5,542,000	5,042,000	48,100	39,100
Receiver.	349	2,521,000	2,288,000	18,500	58,200
Total	843	8,063,000	7,330,000	66,600[4]	97,300[5]

1. Information was not available for four of 18 insolvencies in survey.

2. (B) denotes bankruptcies, (R) denotes receiverships, (R/B) denotes receiverships forced into bankruptcy.

3. Totals include all bankruptcies, including receiverships forced into bankruptcy.

4. 219 workers (26.0%) had outstanding wages averaging $300 [$66,600/(219*1.013)], where 1.013 is the ratio of total employees per MOL records to employees per WCB records in Exhibit 19.

5. 254 workers (30.1%) had outstanding vacation pay averaging $378 [$97,300/(254*1.013)], where the factor 1.013 is defined in Note 4.

EXHIBIT 19

Survey Results for Sample of Ontario Insolvencies Having 25 or More Workers at Time of Insolvency Where Claim For Wages or Benefits Was Made to Ministry of Labour[1] April 1, 1982 - March 31, 1983

Insolvencies in Sample[2]	Number of Employees MOL	Number of Employees WCB	Realizations Including Real Prop	Realizations Excluding Real Prop	Lost Wages	Lost Vac Pay
1. (B)	29	N/A	25,000	25,000	0	0
2. (R)	325	208	12,500,000	12,500,000	0	0
3. (R)	55	186	N/A	N/A	0	0
4. (R/B)	81	170	700,000	700,000	0	0
5. (R/B)	190	184	1,000,000	1,000,000	0	0
6. (B)	116	54	612,000	612,000	23,900	0
7. (B)	54	9	200,000	200,000	0	0
8. (R/B)	362	292	1,635,000	1,635,000	0	0
9. (R)	102	82	510,000	510,000	56,000	0
10. (R/B)	109	22	1,500,000	500,000	0	0
11. (R/B)	191	175	2,600,000	0	200,000	0
12. (R)	74	110	305,000	305,000	0	0
13. (B)	37	N/A	2,600,000	2,600,000	0	0
14. (R)	49	59	184,000	184,000	0	0
15. (R/B)	132	52	1,825,000	1,825,000	0	0
16. (R)	424	682	136,000	136,000	185,000	31,000
17. (R/B)	29	16	976,000	976,000	10,000	9,200
Bankrupt.[3]	1301[4]	974	1,367,3000	10,073,000	233,900	9,200
Receiver.	1029[4]	1327	1,363,5000	13,635,000	241,000	31,000
Total	2330[4]	2301	2,730,8000	23,708,000	474,900[5]	40,200[6]

1. Information was not available for five of 22 insolvencies in survey.

2. (B) denotes bankruptcies, (R) denotes receiverships, (R/B) denotes receiverships forced into bankruptcy.

3. Totals include all bankruptcies, including receiverships forced into bankruptcy.

4. Totals exclude employment for insolvency #13.

5. 862 workers were owed outstanding wages averaging $551 (474900/862).

6. 453 workers were owed outstanding vacation pay averaging $89 (40200/453).

individual insolvencies, the totals for all insolvencies are remarkably close. This suggests that it is reasonable to use the WCB employment data for estimated total numbers of workers in unreported insolvencies.

This exhibit shows that 37% (862) of all 2330 workers lost wages averaging $551 and 19 (453) of all workers lost vacation pay averaging $89. The results concerning realizations of assets are discussed later in this section.

The results for these 17 insolvencies was then compared with information in Ministry files. This comparison is summarized in Exhibit 20. (The figures for lost wages and lost vacation pay are taken from Exhibit 19; all other information is from Ministry files.) This exhibit shows that, at the time the Ministry audit was done, wages were outstanding in nine case, whereas wages in fact were lost (i.e., never paid) in only five. By contrast, vacation pay initially was outstanding in all 17 cases, but was actually lost in only two cases. Note that while this sample represents only 1% of the 1,562 reported insolvencies, it accounts for 16% of the total amount outstanding among these insolvencies ($26.3 million, from Exhibit 4).

Outstanding and Lost Wages and Benefits in Ontario Insolvencies During Study Period

The above statistics for percentages of workers with lost wages and vacation pay and for average losses per worker are summarized in Exhibit 21. These sample averages were used to derive estimates of total losses of wages and vacation pay for all Ontario insolvencies which occurred in the twelve-month study period. These estimates are given in Exhibit 22 for bankruptcies, in Exhibit 23 for receiverships, in Exhibit 24 for other insolvencies and in Exhibit 25 for all insolvencies.

Some explanation is required for how some of the estimates contained in these tables were derived. "Nbr of workers with claim" (numbers of workers with amounts outstanding) were

EXHIBIT 20

Amounts Outstanding and Lost for Sample of Ontario Insolvencies In Which Claims for Wages or Benefits Were Made to Ministry of Labour April 1, 1982 - March 31, 1983

Insol-		Wages			Vacation Pay		Termination Pay		Severance Pay		Total Outstanding	
vency	#Workers	$ Out	$ Lost	#Workers	$ Out	$ Lost	#Workers	$ Out	#Workers	$ Out	#Workers	$ Out
1.	5	2600	0	29	4400	0	0	0	0	0	29	7000
2.	0	300	0	325	161700	0	0	0	0	0	325	162000
3.	0	0	0	55	17400	0	52	29600	6	19000	55	66000
4.	0	0	0	81	27200	0	72	81800	30	137000	81	246000
5.	21	N/A	0	190	66900	0	190	N/A	101	293000	190	670000
6.	100	N/A	23900	116	46900	0	97	N/A	31	58000	116	302000
7.	1	N/A	0	54	10000	0	42	N/A	0	0	54	25000
8.	0	0	0	362	49800	0	0	0	0	0	362	50000
9.	96	N/A	56000	102	60600	0	96	N/A	12	228000	102	392000
10.	0	0	0	109	80600	0	0	0	0	0	109	81000
11.	153	N/A	200000	191	137600	0	165	N/A	85	458000	191	1206000
12.	0	0	0	74	4700	0	0	0	0	0	74	520000
13.	0	0	0	37	10000	0	0	0	0	0	37	10000
14.	0	0	0	49	4700	0	35	30300	0	0	49	35000
15.	21	N/A	0	132	53300	0	132	N/A	28	66000	132	299000
16.	377	N/A	185000	424	28300	31000	337	N/A	0	0	424	196000
17.	29	N/A	10000	29	12200	9200	29	N/A	0	0	29	39000
Totals			474900	2330	776300	40200	1247	N/A	293	1259000	2330	4240000

EXHIBIT 21

Estimated Percentages Of Workers With Lost Wages and Vacation Pay and Average Amounts Lost[1]
April 1, 1982 - March 31, 1983

	Percentage of Workers With Lost Benefit	Average Amount Lost Per Worker
Wages		
- Reported[2]	37.0%	$551
- Unreported[3]	26.0%	$300
Vacation Pay		
- Reported[2]	19.4%	$89
- Unreported[3]	30.1%	$378

1. Estimates derived from results of analysis of samples of reported and unreported insolvencies.

2. From Exhibit 19.

3. From Exhibit 18.

obtained by multiplying numbers of workers from Exhibit 16 by the percentages in Exhibit 17 and (with the exception of the calculation of outstanding wages in bankruptcies, which is discussed below), average amounts outstanding were taken from Exhibit 17. Implicit in these calculations is the assumption that unreported insolvencies are similar to reported ones in respect to both percentages of workers with wages or benefits outstanding, and average outstanding wages and benefits.

Numbers of workers with lost wages and vacation pay and average losses are based on the information in Exhibit 21. Numbers of workers with lost termination pay and with lost severance pay, and the respective average amounts lost, are assumed to be equal to the respective numbers or workers or dollar amounts for wages and benefits outstanding.

The above assumptions suggest that for both reported and unreported insolvencies, total wages outstanding are somewhat less than total amounts lost, which, of course, does not make sense. Consequently, in these two cases it was assumed that: a) the numbers of workers with outstanding wages was the same as the numbers of workers with lost wages; b) the average amount lost in reported cases equalled the average amount outstanding; and c) the average amount outstanding in unreported cases equalled the average amount lost.

The first three columns of Exhibit 25 are taken from the last columns of Exhibits 22, 23 and 24, respectively. The fourth column of Exhibit 25 is computed from the first three in a straight-forward manner.

This exhibit shows that an estimated 11,400 workers lost wages totalling about $3.8 million in the twelve-month study period, and that this represented approximately 32% of the amount initially outstanding (i.e., about 68% of outstanding wages eventually were paid). A somewhat smaller proportion of outstanding vacation pay was lost (about 18%), resulting in some 10,000 workers losing $2.0 million. Considering that nearly all

EXHIBIT 22

Estimated Numbers of Ontario Workers With Outstanding and Lost Wages and Amounts of Outstanding and Lost April 1, 1982 and March 31, 1983

- Bankruptcies -

Wages	**Reported Cases**	**Unreported Cases**	**All Cases**
Nbr workers with claim	1260	901	2161
Nbr of firms represented	102	139	241
Average amount outstanding	$335	$300	$321
Total amount outstanding	$422567	$270631	$693198
Nbr workers with lost benefit	1260	901	2161
Average loss/worker	$335	$300	$321
Total lost Benefit	$422567	$270631	$693198
Percentage of Outstanding Lost	100.0	100.0	100.0

Vacation Pay	**Reported Cases**	**Unreported Cases**	**All Cases**
Nbr workers with claim	5097	3361	8458
Nbr of firms represented	171	234	405
Average amount outstanding	$381	$381	$381
Total amount outstanding	$1942227	$1280565	$3222792
Nbr workers with lost benefit	1023	1045	2068
Average loss/worker	$89	$378	$235
Total lost Benefit	$90769	$395381	$486150
Percentage of Outstanding Lost	4.7	30.9	15.1

Termination Pay	**Reported Cases**	**Unreported Cases**	**All Cases**
Nbr workers with claim	2507	1653	4160
Nbr of firms represented	91	124	215
Average amount outstanding	$1414	$1414	$1414
Total amount outstanding	$3545047	$2337349	$5882396
Nbr workers with lost benefit	2507	1653	4160
Average loss/worker	$1414	$1414	$1414
Total lost Benefit	$3545047	$2337349	$5882396
Percentage of Outstanding Lost	100.0	100.0	100.0

Severance Pay	**Reported Cases**	**Unreported Cases**	**All Cases**
Nbr workers with claim	707	466	1173
Nbr of firms represented	16	22	38
Average amount outstanding	$3825	$3825	$3825
Total amount outstanding	$2703922	$1782771	$4486693
Nbr workers with lost benefit	707	466	1173
Average loss/worker	$3825	$3825	$3825
Total lost Benefit	$2703922	$1782771	$4486693
Percentage of Outstanding Lost	100.0	100.0	100.0

EXHIBIT 23

Estimated Numbers of Ontario Workers With Outstanding and Lost Wages and Amounts of Outstanding and Lost
April 1, 1982 and March 31, 1983
- Receiverships -

Wages	**Reported Cases**	**Unreported Cases**	**All Cases**
Nbr workers with claim	1838	1186	3024
Nbr of firms represented	114	156	270
Average amount outstanding	$1461	$1461	$1461
Total amount outstanding	$2685323	$1732576	$4417899
Nbr workers with lost benefit	1838	1186	3024
Average loss/worker	$551	$300	$453
Total lost Benefit	$1012606	$356149	$1368755
Percentage of Outstanding Lost	37.7	20.6	31.0

Vacation Pay	**Reported Cases**	**Unreported Cases**	**All Cases**
Nbr workers with claim	6600	4138	10738
Nbr of firms represented	178	243	421
Average amount outstanding	$387	$387	$387
Total amount outstanding	$2553901	$1601391	$4155292
Nbr workers with lost benefit	1415	1375	2791
Average loss/worker	$89	$378	$231
Total lost Benefit	$125603	$520320	$645924
Percentage of Outstanding Lost	4.9	32.5	15.5

Termination Pay	**Reported Cases**	**Unreported Cases**	**All Cases**
Nbr workers with claim	2248	1410	3658
Nbr of firms represented	85	116	201
Average amount outstanding	$1571	$1571	$1571
Total amount outstanding	$3531084	$2214121	$5745205
Nbr workers with lost benefit	2248	1410	3658
Average loss/worker	$1571	$1571	$1571
Total lost Benefit	$3531084	$2214121	$5745205
Percentage of Outstanding Lost	100.0	100.0	100.0

Severance Pay	**Reported Cases**	**Unreported Cases**	**All Cases**
Nbr workers with claim	511	320	831
Nbr of firms represented	9	12	21
Average amount outstanding	$2558	$2558	$2558
Total amount outstanding	$1307330	$819745	$2127075
Nbr workers with lost benefit	511	320	831
Average loss/worker	$2558	$2558	$2558
Total lost Benefit	$1307330	$819745	$2127075
Percentage of Outstanding Lost	100.0	100.0	100.0

EXHIBIT 24

Estimated Numbers of Ontario Workers With Outstanding and Lost Wages and Amounts of Outstanding and Lost April 1, 1982 and March 31, 1983
- Other Insolvencies -

Wages	**Reported Cases**	**Unreported Cases**	**All Cases**
Nbr workers with claim	4443	6074	10517
Nbr of firms represented	825	1128	1953
Average amount outstanding	$647	$647	$647
Total amount outstanding	$2873942	$3928933	$6802875
Nbr workers with lost benefit	3148	3022	6170
Average loss/worker	$355	$202	$280
Total lost Benefit	$1118259	$611622	$1729880
Percentage of Outstanding Lost	38.9	15.6	25.4

Vacation Pay	**Reported Cases**	**Unreported Cases**	**All Cases**
Nbr workers with claim	7158	9786	16944
Nbr of firms represented	1102	1507	2609
Average amount outstanding	$225	$225	$225
Total amount outstanding	$1613724	$2206104	$3819828
Nbr workers with lost benefit	1654	3505	5159
Average loss/worker	$52	$222	$167
Total lost Benefit	$86104	$777816	$863920
Percentage of Outstanding Lost	5.3	35.3	22.6

Termination Pay	**Reported Cases**	**Unreported Cases**	**All Cases**
Nbr workers with claim	3133	4283	7416
Nbr of firms represented	367	502	869
Average amount outstanding	$946	$946	$946
Total amount outstanding	$2963695	$4051634	$7015329
Nbr workers with lost benefit	3133	4283	7416
Average loss/worker	$946	$946	$946
Total lost Benefit	$2963695	$4051634	$7015329
Percentage of Outstanding Lost	100.0	100.0	100.0

Severance Pay	**Reported Cases**	**Unreported Cases**	**All Cases**
Nbr workers with claim	738	1009	1747
Nbr of firms represented	18	25	43
Average amount outstanding	$3043	$3043	$3043
Total amount outstanding	$2245507	$3069807	$5315314
Nbr workers with lost benefit	738	1009	1747
Average loss/worker	$3043	$3043	$3043
Total lost Benefit	$2245507	$3069807	$5315314
Percentage of Outstanding Lost	100.0	100.0	100.0

EXHIBIT 25

Estimated Numbers of Ontario Workers With Outstanding and Lost Wages and Amounts of Outstanding and Lost April 1, 1982 and March 31, 1983

- All Insolvencies -

Wages	**Bank-Ruptcies**	**Receiv-erships**	**Other Insols.**	**All Insols.**
Nbr workers with claim	2161	3024	10517	15702
Nbr of firms represented	241	270	1953	2464
Average amount outstanding	$321	$461	$647	$759
Total amount outstanding	$693198	$4417899	$6802875	$11913972
Nbr workers with lost benefit	2161	3024	6170	11355
Average loss/worker	$321	$453	$280	$334
Total lost Benefit	$693198	$1368755	$1729880	$3791833
Percentage of Outstanding Lost	100.0	31.0	25.4	31.8

Vacation Pay	**Bank-Ruptcies**	**Receiv-erships**	**Other Insols.**	**All Insols.**
Nbr workers with claim	8458	10738	16944	36140
Nbr of firms represented	405	421	2609	3435
Average amount outstanding	$381	$387	$225	$310
Total amount outstanding	$3222792	$4155292	$3819828	$11197911
Nbr workers with lost benefit	2068	2791	5159	10018
Average loss/worker	$235	$231	$167	$199
Total lost Benefit	$486150	$645924	$863920	$1995994
Percentage of Outstanding Lost	15.1	15.5	22.6	17.8

Termination Pay	**Bank-Ruptcies**	**Receiv-erships**	**Other Insols.**	**All Insols.**
Nbr workers with claim	4160	3658	7416	15234
Nbr of firms represented	215	201	869	1285
Average amount outstanding	$1414	$1571	$946	$1224
Total amount outstanding	$5882396	$5745205	$7015329	$18642929
Nbr workers with lost benefit	4160	3658	7416	15234
Average loss/worker	$1414	$1571	$946	$1224
Total lost Benefit	$5882396	$5745205	$7015329	$18642929
Percentage of Outstanding Lost	100.0	100.0	100.0	100.0

Severance Pay	**Bank-Ruptcies**	**Receiv-erships**	**Other Insols.**	**All Insols.**
Nbr workers with claim	1173	831	1747	3731
Nbr of firms represented	38	21	43	102
Average amount outstanding	$3825	$2558	$3043	$3180
Total amount outstanding	$4486693	$2127075	$5315314	$11929082
Nbr workers with lost benefit	1173	831	1747	3751
Average loss/worker	$3825	$2558	$3043	$3180
Total lost Benefit	$4486693	$2127075	$5315314	$11929082
Percentage of Outstanding Lost	100.0	100.0	100.0	100.0

workers who lost wages also lost vacation pay, it can be estimated that roughly 12,000 workers lost a total of $5.8 million in wages and vacation pay, for an average average loss of approximately $500.

The results for termination pay and severance pay are markedly different from those for wages and vacation pay, in that the amount outstanding tended to be significantly larger on a per-worker basis, and rarely were these amounts paid. Exhibit 25 shows that, over the study period, roughly 15,200 workers lost an average of about $1,200 of termination pay for a total loss of almost $19 million. A smaller number of workers lost severance pay (about 3,800), but average losses (about $3,800) were considerably larger, causing the total amount lost to be nearly $12 million. In total, about $31 million was lost in termination pay and severance pay.

The reason for the lack of collections of termination pay and severance pay is that these benefits are assigned a lower priority in insolvencies than are outstanding wages and vacation pay and claims from unsecured creditors. Trustees and receivers tend to treat outstanding wages and vacation pay similarly, regarding both as having been earned prior to the occurrence of the insolvency. By contrast, claims for termination pay and the severance pay generally are seen as arising only after the company becomes insolvent, and in many cases may not even be regarded as legitimate claims. Considering that the timing of claims in insolvencies has an important bearing on the priority that they are given, it is perhaps not surprising that whereas most of outstanding wages and vacation pay is eventually paid, little of the outstanding termination pay or severance pay is ever received.

A related consideration is that receiverships often are refinanced or sold as "going-concerns", with workers being hired back, paid outstanding wages and having their seniority and vacation pay credits restored. In these cases claims for termination pay or severance pay may no longer be applicable. (For this reason, the estimates presented above for lost termination pay and severance pay may be overestimated somewhat.)

The main results contained in Exhibit 25 are displayed graphically in Exhibits 1, 2 and 3 in the Summary.

Potential Effectiveness of Establishment of "Super-Priority" for Outstanding Wages and Benefits

The results of the analysis of the samples of reported and unreported insolvencies provide some indication of the potential effectiveness of the establishment of a "super-priority" for outstanding wages and benefits in insolvencies.

Exhibit 18 and 19 show that in the sample of 31 insolvencies subjected to detailed analysis, realizations of assets totalled approximately $35.4 million, of which $31.0 million was exclusive of real property. As these firms together employed an estimated 3,173 workers at the time of insolvency, total realizations amounted to an average of approximately $11,150 per worker.

In the nine insolvencies in which wages or vacation pay were lost, realizations were $6.7 million ($3.8 if real property is excluded), compared to wage and vacation pay losses totalling about $680,000. In all but two of the cases realizations were substantially larger than lost wages and vacation pay. In one of the two exceptions (#11 in Exhibit 19), total realizations were much larger than amounts lost, but these realizations were all in real property. In the other exception (#16 in Exhibit 19), lost wages and benefits were somewhat larger than realizations.

Realizations also can be compared with amounts outstanding for the reported insolvencies, which were given in Exhibit 20. This comparison (excluding case #3, where information on realizations was not available) shows that realizations net of real property probably exceeded outstanding wages and vacation pay in all cases but two (#11 and #16). Considering also outstanding termination pay (in 11 cases) and severance pay (in seven cases), the total amount outstanding over all 16 insolvencies was approximately $4.2 million, compared to realizations net of real property totalling $23.7 million. In only three cases (#11, #12 and #16) were realizations net of real property insufficient to cover total outstanding wages and benefits. In these cases, approximately 700 workers had claims totalling $1.9 million, whereas realizations net of real property totalled only about $440,00.

Although these results are drawn from relatively small samples of insolvencies, and therefore must be interpreted with caution, they appear to support the proposition that, a "super-priority" for outstanding wages and benefits probably would be effective in helping most workers recover amounts due, regardless of whether the super-priority were restricted to wages and vacation pay, or included termination pay and severance pay as well. Even with a super-priority, however, there would still be cases where workers would lose wages or benefits, and, depending on how it were implemented, some workers might still be faced with long delays in collecting amounts outstanding.

Other issues concerning super-priorities must also be examined, but these are outside the scope of this study. These include the questions of whether secured creditors could or would subvert the intentions of a super-priority and whether the establishment of a super-priority would limit the availability or increase the cost of debt capital.

Future Losses of Wages and Benefits in Insolvencies

The numbers of workers with lost wages and benefits, and the total amounts lost, may change over time, of course, depending on the size of the provincial economy, general economic conditions and other factors. The twelve-month study period, being the low point of a very severe recession, probably is not a good guide to losses of wages and benefits that will occur in Ontario insolvencies over the next few years.

To provide a rough indication of how lost wages and benefits may change over time, the estimates presented above for the twelve-month study period have been scaled in proportion to the numbers of Ontario business bankruptcies that occurred in each of the years between 1977 and 1984. Estimated numbers of workers with lost wages and benefits are given in Exhibit 26; estimated losses are given in Exhibit 27. The assumption implicit in these graphs is that numbers of workers with lost wages and benefits and amounts of wages and benefits lost (expressed in 1982 dollars) are approximately proportional to numbers of Ontario business bankruptcies. (In fact, the proportion of bankruptcies among insolvencies may have gone down somewhat in the recent past, with creditors making greater use of general security agreements under the province's _Personal Security Act_ and _Corporate Securities Registration Act_.)

Exhibit 26 shows the numbers of Ontario business bankruptcies for each of the years 1977 through 1984[1], and on the following line, the numbers of business bankruptcies expressed as a fraction of the estimated number which occurred during the twelve-month study period (shown in Footnote 2 to be 3,385). In 1977, for example, there were only about one-half as many business bankruptcies as there were during the twelve-month study period. The number of workers with lost wages and benefits during the study period are shown in the column labelled "Base". These amounts are multiplied by the ratios in the second row to derive the estimates of the numbers of workers with lost wages and benefits for each of the years 1977 through 1984.

A similar calculation in Exhibit 27 provides estimates of lost wages and benefits for each of the years 1977 through 1984 (in 1982 dollars), assuming that entitlements to benefits in

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[1] Note that many business bankruptcies were very small companies which were excluded in the survey of trustees and receivers.

EXHIBIT 26

Estimated Annual Numbers of Workers With Lost Wages and Benefits in Ontario Insolvencies at Business Bankruptcy Rates Experienced Between 1977 and 1983

Number of Ontario		1977	1978	1979	1980	1981	1982	1983	1984
Business Bankruptcies[1]		1760	2141	2231	2622	2901	3607	3020	2579
Ratio to Nbr. in 82/83[2]		0.509	0.619	0.645	0.758	0.838	1.042	0.873	0.745
	Base[3]								
Wages	11,355	5,904	7,182	7,484	8,795	9,731	12,100	10,131	8,651
Vacation Pay	10,018	5,209	6,336	6,603	7,760	8,586	10,675	8,938	7,633
Termination Pay	15,234	7,921	9,635	10,040	11,800	13,055	16,233	13,591	11,606
Severance Pay	3,751	1,951	2,373	2,473	2,906	3,215	3,998	3,347	2,858

1. Insolvency Bulletins, Office of the Superintendent of Bankruptcy.

2. 3,385 Ontario business bankruptcies occurred between April 1, 1982 and March 31, 1983.

3. Base estimates for period April 1, 1982 - March 31, 1983, taken from Exhibit 25.

EXHIBIT 27

Estimated Annual Amounts of Lost Wages and Benefits in Ontario Insolvencies at Business Bankruptcy Rates Experienced Between 1977 and 1983
(millions of 1982 dollars)

	Base[2]	1977	1978	1979	1980	1981	1982	1983	1984
Ratio to Base Values[1]		0.509	0.619	0.645	0.758	0.838	1.042	0.873	0.745
Wages	3.8	2.0	2.4	2.5	2.9	3.3	4.0	3.4	2.9
Vacation Pay	2.0	1.0	1.3	1.3	1.6	1.7	2.1	1.8	1.5
Subtotal	**5.8**	**3.0**	**3.7**	**3.8**	**4.5**	**5.0**	**6.2**	**5.2**	**4.4**
Termination Pay	18.6	9.9	11.8	12.3	14.4	16.0	19.9	16.6	14.2
Severance Pay	11.9	6.2	7.6	7.9	9.2	10.2	12.7	10.6	9.1
Subtotal	**30.5**	**15.9**	**19.3**	**20.1**	**23.7**	**26.2**	**32.6**	**27.3**	**23.3**
Total	**36.3**	**18.9**	**23.0**	**23.9**	**28.2**	**31.2**	**38.8**	**32.5**	**27.7**

1. From Exhibit 26.

2. Base estimates for period April 1, 1982 - March 31, 1983, taken from Exhibit 25.

these years had been similar to those in force during the study period (in fact, eligibility for severance pay was only legislated in 1981). This exhibit shows, for example, that if annual numbers of business bankruptcies returned to levels prevailing in the late 1970's, losses would only be about two-thirds as large as they were during the study period. Considering also the general strenghening of firms that survived the recession and reasonably optimistic expectations for the Ontario economy over the balance of the decade, it seems unlikely that annual losses over the next few years will approach the amounts experienced during the study period.

APPENDIX A

ANALYSIS OF WAGE CLAIMS INVESTIGATED BY MINISTRY OF LABOUR, SUMMARIZED BY INDUSTRY GROUP AND SIZE OF FIRM

This appendix contains three exhibits which provide a detailed summary of all insolvencies for which a wage claim was made to the Ministry between April 1, 1982 and March 31, 1983. Exhibits A-1 through A-4 provide information on bankruptcies, receiverships, other insolvencies and all insolvencies, respectively. Each of these exhibits provides a primary breakdown by industry group and a secondary breakdown by size of company. The information contained in these exhibits was aggregated to produce Exhibits 1-8 in Section 3.

EXHIBIT A1

Analysis of Wage Claims Investigated by Ministry of Labour
Between April 1, 1982 and March 31, 1983
Summarized by Industry Group and Size of Firm
Bankruptcies

	VACATION PAY					TERM. PAY			SEVERANCE PAY					UNPAID WAGES			TOTAL					COLLECTED	
	Num	Employees		Amount Due		Num	Employees		Num	Employees		Amount Due		Num	Employees		Num	Employees		Amount Due		Amount	Col
	Cpy	Total	Avg	Total	Avg	Cpy	Total	Avg	Cpy	Total	Avg	Total	Avg	Cpy	Total	Avg	Cpy	Total	Avg	Total	Avg	Total	Avg
* Service																							
** 0 to 9 employees																							
	22	59	3	11124	188	7	8	1	0	0	0	0	0	15	45	3	24	67	3	41865	625	0	0
** 10 to 24 employees																							
	7	91	13	20272	223	4	40	10	0	0	0	0	0	3	26	9	7	91	13	38100	410	12083	130
** 25 to 49 employees																							
	6	175	29	18470	106	4	74	18	0	0	0	0	0	3	29	10	6	175	29	37716	216	0	0
** 50 to 99 employees																							
	1	86	86	22086	257	1	65	65	0	0	0	0	0	1	80	80	1	86	86	99401	1156	0	0
** 100 to 199 employees																							
	3	341	114	95185	279	1	186	186	1	39	39	91579	2348	1	29	29	3	341	114	435600	1277	0	0
	39	752	19	167147	222	17	373	22	1	39	39	91578	2348	23	209	9	41	762	19	652782	857	12083	16
* Retail																							
** 0 to 9 employees																							
	29	44	2	8074	184	10	10	1	0	0	0	0	0	22	29	1	30	50	2	31478	630	324	6
** 10 to 24 employees																							
	3	66	22	34216	518	3	33	11	0	0	0	0	0	1	1	1	3	66	22	101020	1531	0	0
** 25 to 49 employees																							
	6	221	37	96498	437	0	0	0	0	0	0	0	0	0	0	0	6	221	37	96498	437	61604	279
** 50 to 99 employees																							
	4	291	73	92577	318	1	58	58	0	0	0	0	0	3	95	32	4	291	73	165832	569	0	0
** 100 to 199 employees																							
	3	378	126	218527	581	3	360	120	3	182	61	655720	3603	0	0	0	3	454	151	1360960	2998	0	0
** 200 or more employees																							
	1	283	283	99570	352	1	283	283	1	140	140	405578	2897	1	29	29	1	284	284	928440	3269	0	0
	46	1282	27	549082	431	18	724	40	4	322	80	1061298	3296	27	154	6	47	1366	29	2684046	1965	61928	45
* Construction																							
** 0 to 9 employees																							
	10	18	2	5594	311	6	11	2	0	0	0	0	0	7	10	1	11	24	2	38141	1589	0	0
** 10 to 24 employees																							
	3	54	18	5032	93	1	32	32	0	0	0	0	0	1	18	18	3	54	18	44763	829	0	0
** 25 to 49 employees																							
	1	50	50	12673	253	0	0	0	0	0	0	0	0	1	53	53	1	53	53	62256	1175	0	0
	14	122	9	23299	191	7	43	6	0	0	0	0	0	9	81	9	15	131	9	145160	1108	0	0
* Financial																							
** 0 to 9 employees																							
	3	2	1	4088	2044	4	3	1	0	0	0	0	0	4	3	1	4	3	1	19200	6400	0	0

	VACATION PAY					TERM. PAY			SEVERANCE PAY					UNPAID WAGES			TOTAL					COLLECTED	
	Num Cpy	Employees Total	Employees Avg	Amount Due Total	Amount Due Avg	Num Cpy	Employees Total	Employees Avg	Num Cpy	Employees Total	Employees Avg	Amount Due Total	Amount Due Avg	Num Cpy	Employees Total	Employees Avg	Num Cpy	Employees Total	Employees Avg	Amount Due Total	Amount Due Avg	Amount Total	Col Avg
	3	2	1	4088	2044	4	3	1	0	0	0	0	0	4	3	1	4	3	1	16800	8400	0	0
* Transport																							
** 0 to 9 employees																							
	1	1	1	152	152	1	1	1	0	0	0	0	0	0	0	0	1	1	1	623	623	0	0
** 10 to 24 employees																							
	1	8	8	2983	373	0	0	0	0	0	0	0	0	1	6	6	1	14	14	5388	385	0	0
	2	9	4	3135	348	1	1	1	0	0	0	0	0	1	6	6	2	15	8	6011	401	0	0
* Manufacturing																							
** 0 to 9 employees																							
	19	76	4	20867	275	11	22	2	0	0	0	0	0	12	35	3	21	82	4	45838	557	2576	31
** 10 to 24 employees																							
	12	200	17	57086	285	7	82	12	1	21	21	77425	3687	4	38	10	14	223	16	205431	921	27920	125
** 25 to 49 employees																							
	7	249	36	128118	515	6	189	32	1	29	29	99187	3420	6	155	26	7	251	36	419270	1670	30682	122
** 50 to 99 employees																							
	8	585	73	198947	340	7	436	62	4	111	28	453173	4083	3	198	66	8	585	73	1384131	2366	92679	158
** 100 to 199 employees																							
	7	1111	159	400437	360	4	387	97	4	171	43	570579	3337	3	146	49	7	1111	159	1707807	1537	0	0
** 200 or more employees																							
	1	450	450	223896	498	0	0	0	0	0	0	0	0	0	0	0	1	450	450	223896	498	223896	498
	54	2671	49	1029385	385	35	1128	32	10	331	33	1187384	3587	28	575	21	58	2702	47	3986277	1475	377062	140
* Government & Non-Profit																							
** 0 to 9 employees																							
	1	11	11	2566	233	1	4	4	0	0	0	0	0	1	10	10	1	11	11	7475	680	0	0
	1	11	11	2566	233	1	4	4	0	0	0	0	0	1	10	10	1	11	11	7475	680	0	0
* Other																							
** 0 to 9 employees																							
	10	38	4	13142	346	6	17	3	0	0	0	0	0	7	20	3	10	41	4	43898	1071	0	0
** 10 to 24 employees																							
	1	33	33	4882	148	1	30	30	0	0	0	0	0	1	30	30	1	33	33	16015	485	0	0
** 100 to 199 employees																							
	1	197	197	56613	287	1	186	186	1	15	15	36466	2431	1	172	172	1	197	197	480686	2485	56613	287
	12	268	22	74637	279	8	233	29	1	15	15	36466	2431	9	222	25	12	271	23	543507	2006	56613	209
	171	5087	30	1847870	363	91	2507	28	16	707	44	2386829	3376	108	1280	12	180	5281	29	8047848	1530	459085	87

EXHIBIT A2

Analysis of Wage Claims Investigated by Ministry of Labour
Between April 1, 1982 and March 31, 1983
Summarized by Industry Group and Size of Firm
Receiverships

VACATION PAY					TERM. PAY			SEVERANCE PAY					UNPAID WAGES			TOTAL					COLLECTED	
Num Cpy	Employees Total	Avg	Amount Due Total	Avg	Num Cpy	Employees Total	Avg	Num Cpy	Employees Total	Avg	Amount Due Total	Avg	Num Cpy	Employees Total	Avg	Num Cpy	Employees Total	Avg	Amount Due Total	Avg	Amount Total	Col Avg
* Service																						
** 0 to 9 employees																						
18	47	3	8390	178	4	4	1	0	0	0	0	0	20	55	3	20	61	3	61978	1016	9953	163
** 10 to 24 employees																						
7	102	15	14383	141	4	57	14	0	0	0	0	0	5	65	13	7	131	19	81818	625	0	0
** 25 to 49 employees																						
5	161	32	18870	118	4	66	16	0	0	0	0	0	2	54	27	5	161	32	50858	317	0	0
** 50 to 99 employees																						
4	257	64	50112	195	1	4	4	0	0	0	0	0	1	4	4	4	257	64	61776	240	0	0
34	567	17	91435	161	13	131	10	0	0	0	0	0	28	178	6	36	610	17	256528	421	9953	16
* Retail																						
** 0 to 9 employees																						
16	60	4	38628	644	10	30	3	0	0	0	0	0	13	48	4	17	71	4	115752	1630	4256	60
** 10 to 24 employees																						
7	114	16	25945	228	6	72	12	0	0	0	0	0	5	21	4	7	116	17	78678	678	15272	132
** 25 to 49 employees																						
5	154	31	63840	415	1	35	35	0	0	0	0	0	1	28	28	5	154	31	125701	816	8730	57
** 50 to 99 employees																						
1	66	66	32758	496	0	0	0	0	0	0	0	0	0	0	0	1	66	66	32758	496	0	0
29	394	14	161171	409	17	137	8	0	0	0	0	0	19	97	5	30	407	14	352889	867	28258	69
* Construction																						
** 0 to 9 employees																						
8	21	3	2914	139	5	17	3	0	0	0	0	0	7	12	2	12	30	2	50208	1674	2058	69
** 10 to 24 employees																						
2	39	20	7888	202	2	20	10	0	0	0	0	0	2	21	10	2	40	20	34876	872	0	0
** 25 to 49 employees																						
4	125	31	43006	344	0	0	0	0	0	0	0	0	2	51	26	4	125	31	88894	711	11125	89
** 50 to 99 employees																						
1	101	101	12733	126	1	5	5	0	0	0	0	0	0	0	0	1	101	101	18090	179	0	0
** 100 to 199 employees																						
1	139	139	6434	46	1	139	139	0	0	0	0	0	0	0	0	1	139	139	167896	1208	0	0
16	425	27	73005	172	9	181	20	0	0	0	0	0	11	84	8	20	425	21	361374	850	13183	31
* Financial																						
** 0 to 9 employees																						
1	1	1	114	114	0	0	0	0	0	0	0	0	1	1	1	1	1	1	484	484	0	0
1	1	1	114	114	0	0	0	0	0	0	0	0	1	1	1	1	1	1	484	484	0	0

	VACATION PAY					TERM. PAY			SEVERANCE PAY					UNPAID WAGES			TOTAL					COLLECTED	
	Num Cpy	Employees Total	Employees Avg	Amount Total	Due Avg	Num Cpy	Employees Total	Employees Avg	Num Cpy	Employees Total	Employees Avg	Amount Total	Due Avg	Num Cpy	Employees Total	Employees Avg	Num Cpy	Employees Total	Employees Avg	Amount Total	Due Avg	Amount Total	Col Avg
• Transport																							
** 0 to 9 employees	1	1	1	78	78	0	0	0	0	0	0	0	0	0	0	0	1	1	1	78	78	0	0
** 50 to 99 employees	1	90	90	5762	64	0	0	0	0	0	0	0	0	1	90	90	1	90	90	18942	210	0	0
	2	91	46	5840	64	0	0	0	0	0	0	0	0	1	90	90	2	91	46	19018	208	0	0
• Manufacturing																							
** 0 to 9 employees	21	70	3	27891	391	11	35	3	0	0	0	0	0	15	33	2	25	75	3	92248	1070	13080	174
** 10 to 24 employees	19	299	15	85548	289	8	77	10	0	0	0	0	0	10	87	8	19	295	16	229418	778	81	0
** 25 to 49 employees	12	427	35	188014	452	6	188	32	0	0	0	0	0	4	78	20	12	427	35	384284	894	11259	26
** 50 to 99 employees	13	831	64	252955	304	7	385	55	4	153	38	848430	5545	4	139	35	14	980	70	1929175	1968	0	0
** 100 to 199 employees	6	849	142	448137	528	2	216	108	2	58	29	170321	2941	4	329	82	6	850	142	1255790	1477	97288	114
** 200 or more employees	8	2283	285	480370	212	4	668	167	2	200	100	180236	901	1	483	483	8	2705	338	3542252	840	0	0
	79	4729	60	1485415	314	39	1571	41	8	408	51	1209895	2965	38	1118	29	84	5332	63	8431215	1208	121859	23
• Forestry & Mining																							
** 0 to 9 employees	2	2	1	470	235	0	0	0	0	0	0	0	0	2	2	1	2	2	1	2404	1202	0	0
** 25 to 49 employees	1	44	44	8761	199	1	23	23	0	0	0	0	0	1	30	30	1	44	44	48255	1097	0	0
	3	46	15	9231	201	1	23	23	0	0	0	0	0	3	32	11	3	46	15	50659	1101	0	0
• Other																							
** 0 to 9 employees	11	34	3	12048	354	5	5	1	0	0	0	0	0	11	24	2	12	41	3	34730	847	2071	51
** 25 to 49 employees	2	84	42	26682	318	1	2	2	0	0	0	0	0	1	35	35	2	84	42	30152	587	0	0
** 100 to 199 employees	1	229	229	165268	722	1	186	186	1	102	102	548842	5380	1	184	184	1	233	233	1449229	6219	888587	3857
	14	347	25	204017	588	7	193	28	1	102	102	548842	5380	13	243	19	15	358	24	1533111	4282	900658	2516
	178	6800	37	2030228	203	85	2846	35	9	811	87	1758937	2442	114	1838	16	181	7260	38	8985208	1238	1073776	147

EXHIBIT A8

Analysis of Wage Claims Investigated by Ministry of Labour
Between April 1, 1982 and March 31, 1983
Summarized by Industry Group and Size of Firm
Other Insolvencies

VACATION PAY					TERM. PAY			SEVERANCE PAY					UNPAID WAGES			TOTAL					COLLECTED	
Num	Employees		Amount	Due	Num	Employees		Num	Employees		Amount	Due	Num	Employees		Num	Employees		Amount	Due	Amount	Col
Cpy	Total	Avg	Total	Avg	Cpy	Total	Avg	Cpy	Total	Avg	Total	Avg	Cpy	Total	Avg	Cpy	Total	Avg	Total	Avg	Total	Avg
* Service																						
** 0 to 9 employees																						
316	738	2	114288	155	100	155	2	0	0	0	0	0	236	544	2	347	762	2	398529	504	12407	16
** 10 to 24 employees																						
88	807	14	105850	118	34	248	7	0	0	0	0	0	88	657	11	88	881	14	405410	406	12516	13
** 25 to 49 employees																						
16	488	31	23088	47	9	191	21	0	0	0	0	3	13	283	21	16	515	32	272273	725	0	0
** 50 to 99 employees																						
16	810	51	57480	59	13	287	21	0	0	0	0	0	16	808	50	16	878	51	438022	448	81514	58
414	2851	7	311817	108	165	[illegible]42	8	0	0	0	0	0	238	2275	7	448	3276	7	1614234	483	108437	32
* Retail																						
** 0 to 9 employees																						
184	422	2	73177	168	78	110	1	0	0	0	0	0	102	283	2	187	421	2	273462	850	3676	9
** 10 to 24 employees																						
13	171	13	14880	88	3	58	20	0	0	0	0	0	9	84	10	13	178	14	70881	388	0	0
** 25 to 49 employees																						
6	218	36	48186	203	6	128	21	0	0	0	0	0	3	3	1	6	218	36	92529	428	15185	70
** 50 to 99 employees																						
0	0	0	0	0	0	0	0	3	222	74	878281	3881	0	0	0	3	222	74	878281	3881	0	0
203	819	4	136028	166	87	297	3	3	222	74	878281	3881	124	380	3	218	1097	5	1318113	1288	19062	16
* Construction																						
** 0 to 9 employees																						
150	345	2	57283	165	6	22	4	0	0	0	0	0	135	228	2	163	368	2	219442	573	0	0
** 10 to 24 employees																						
13	165	13	18085	118	0	0	0	3	69	23	182177	2840	8	108	12	16	237	15	297185	1254	0	0
** 25 to 49 employees																						
3	84	28	2810	31	0	0	0	0	0	0	0	0	3	50	17	3	84	28	23345	278	0	0
** 50 to 99 employees																						
3	175	58	1218	7	0	0	0	0	0	0	0	0	0	0	0	3	175	58	31581	181	0	0
169	770	5	80704	105	6	22	4	3	69	23	182177	2840	137	385	3	185	878	5	571573	850	0	0
* Agriculture																						
** 0 to 9 employees																						
6	6	1	2447	408	0	0	0	0	0	0	0	0	3	3	1	6	6	1	2550	425	0	0
6	6	1	2447	408	0	0	0	0	0	0	0	0	3	3	1	6	6	1	2550	425	0	0
* Financial																						
** 0 to 9 employees																						
3	8	2	78	13	0	0	0	0	0	0	0	0	3	6	2	3	6	2	1897	316	0	0

	VACATION PAY					TERM. PAY			SEVERANCE PAY					UNPAID WAGES			TOTAL					COLLECTED	
	Num Cpy	Employees Total	Avg	Amount Total	Due Avg	Num Cpy	Employees Total	Avg	Num Cpy	Employees Total	Avg	Amount Total	Due Avg	Num Cpy	Employees Total	Avg	Num Cpy	Employees Total	Avg	Amount Total	Due Avg	Amount Total	Col Avg
	3	8	2	78	13	0	0	0	0	0	0	0	0	3	8	2	3	8	2	1987	318	0	0
• Transport																							
** 0 to 9 employees	25	48	2	5788	128	0	0	0	0	0	0	0	0	18	18	1	25	48	2	18377	375	0	0
** 10 to 24 employees	3	44	15	272	9	0	0	0	0	0	0	0	0	0	0	0	3	44	15	7085	180	0	0
** 25 to 49 employees	3	91	30	1289	15	0	0	0	0	0	0	0	0	3	8	3	3	91	30	37480	412	0	0
** 100 to 199 employees	3	3	1	203	68	0	0	0	0	0	0	0	0	0	0	0	3	347	116	3589	10	0	0
	34	164	5	7829	41	0	0	0	0	0	0	0	0	18	27	1	34	531	16	88511	125	0	0
• Manufacturing																							
** 0 to 9 employees	108	295	2	78708	287	53	101	2	0	0	0	0	0	118	221	2	163	329	2	287772	888	12785	38
** 10 to 24 employees	28	432	15	105782	246	25	279	11	0	0	0	0	0	22	236	11	28	435	16	331517	1222	3628	5
** 25 to 49 employees	3	91	30	40835	448	3	84	28	0	0	0	0	0	3	88	29	3	91	30	175053	1884	0	0
** 50 to 99 employees	3	291	97	254187	874	6	391	65	6	297	50	1318835	4440	3	275	92	6	489	81	2987808	6123	0	0
** 100 to 199 employees	3	381	127	35288	93	3	381	127	3	106	35	348117	3285	0	0	0	3	381	127	1158158	3040	0	0
	188	1490	8	514780	345	90	1228	14	9	403	45	1684752	4131	144	819	5	203	1721	8	5140008	2987	15711	10
• Forestry & Mining																							
** 0 to 9 employees	16	30	2	2789	99	0	0	0	0	0	0	0	0	13	21	2	19	33	2	18947	574	0	0
** 10 to 24 employees	3	47	16	18800	417	0	0	0	0	0	0	0	0	0	0	0	3	47	16	18800	417	0	0
** 25 to 49 employees	3	3	1	103	34	0	0	0	0	0	0	0	0	3	3	1	3	103	34	1072	10	0	0
	22	80	4	22491	291	0	0	0	0	0	0	0	0	16	24	2	25	183	7	38819	216	0	0
• Government & Non-Profit																							
** 0 to 9 employees	6	6	1	1819	303	0	0	0	0	0	0	0	0	0	0	0	6	6	1	1819	303	0	0
** 10 to 24 employees	3	69	23	32723	474	3	69	23	0	0	0	0	0	0	0	0	3	69	23	42307	813	21029	305
	9	75	8	34542	481	3	69	23	0	0	0	0	0	0	0	0	9	75	8	44126	588	21029	280
• Other																							
** 0 to 9 employees	34	82	2	10087	184	16	27	2	0	0	0	0	0	28	45	2	44	70	2	87981	1257	3979	55
** 10 to 24 employees	8	128	14	14157	111	8	90	15	0	0	0	0	0	9	103	11	9	139	14	107175	887	0	0

```
---------VACATION PAY-------- --TERM. PAY-- ---------SEVERANCE PAY------- -UNPAID WAGES- ---------------TOTAL-------------- -COLLECTED-
Num Employees   Amount  Due Num Employees Num Employees   Amount  Due Num Employees Num Employees    Amount  Due  Amount Col
Cpy Total Avg   Total   Avg Cpy Total Avg Cpy Total Avg   Total   Avg Cpy Total Avg Cpy Total Avg    Total   Avg  Total  Avg
*******************************************************************************************************************************
   ** 50 to 99 employees
  3   166  55     4614   28   0     0   0   0     0   0        0    0   3    13   4   3   166  55      7559   46    7559  46
   ** 100 to 199 employees
  3   431 144    78744  183   3   400 133   3    44  15    31707  721   3   353 118   3   431 144    241856  561       0   0
-------------------------------------------------------------------------------------------------------------------------------
 48   777  16   107802  139  25   517  21   3    44  15    31707  721  43   514  12  59   786  13    444671  566   11438  14

*******************************************************************************************************************************
1102  7168   6 1218118  170 267  2133   8  18   738  41  2757917 3737 885  4443   5 1181  8508   7  9241600 1086  174877  21
```

EXHIBIT A4

Analysis of Wage Claims Investigated by Ministry of Labour
Between April 1, 1982 and March 31, 1983
Summarized by Industry Group and Size of Firm
All Insolvencies

	VACATION PAY					TERM. PAY			SEVERANCE PAY					UNPAID WAGES			TOTAL					COLLECTED	
	Num Cpy	Employees Total	Employees Avg	Amount Due Total	Amount Due Avg	Num Cpy	Employees Total	Employees Avg	Num Cpy	Employees Total	Employees Avg	Amount Due Total	Amount Due Avg	Num Cpy	Employees Total	Employees Avg	Num Cpy	Employees Total	Employees Avg	Amount Due Total	Amount Due Avg	Amount Col Total	Amount Col Avg
* Service																							
** 0 to 9 employees	356	844	2	133700	158	111	187	2	0	0	0	0	0	273	842	2	391	880	2	480472	547	22375	24
** 10 to 24 employees	80	1100	14	141566	129	42	348	8	0	0	0	0	0	67	748	11	80	1215	15	525368	432	24866	20
** 25 to 49 employees	27	832	31	60236	72	17	331	19	0	0	0	0	0	19	381	20	27	891	33	481947	540	0	0
** 50 to 99 employees	21	1153	55	138891	121	15	458	31	0	0	0	0	0	18	880	48	21	1321	63	597180	452	81814	62
** 100 to 199 employees	3	341	114	95195	279	1	162	162	1	39	39	91578	2348	1	39	39	3	341	114	435460	1277	0	0
	487	4270	9	570388	134	186	1486	8	1	39	39	91578	2348	377	2890	7	522	4648	9	2522544	543	129055	28
* Retail																							
** 0 to 9 employees	229	530	2	118670	224	98	150	2	0	0	0	0	0	157	366	2	244	542	2	420880	776	8488	16
** 10 to 24 employees	23	350	15	74941	214	12	164	14	0	0	0	0	0	15	118	8	25	380	16	250540	659	15272	42
** 25 to 49 employees	17	591	35	208507	353	7	163	23	0	0	0	0	0	4	29	7	17	591	35	314728	533	85680	145
** 50 to 99 employees	5	357	71	125335	351	1	58	58	3	222	74	879291	3961	3	95	32	8	579	72	1677671	1881	0	0
** 100 to 199 employees	2	378	189	219527	581	3	360	120	3	182	61	555720	3053	0	0	0	3	454	151	1360880	2998	0	0
** 200 or more employees	1	264	264	92870	352	1	263	263	1	140	140	405878	2899	1	29	29	1	264	264	929440	3520	0	0
	278	2475	9	840758	340	122	1158	9	7	544	78	1840889	3384	180	637	4	298	2910	9	4483048	1540	109440	38
* Construction																							
** 0 to 9 employees	158	396	2	66501	171	17	60	3	0	0	0	0	0	147	348	2	185	487	2	342788	704	2059	5
** 10 to 24 employees	18	258	14	32500	126	3	52	17	3	69	23	102177	2840	12	148	12	21	321	15	357683	1114	0	0
** 25 to 49 employees	8	258	32	58021	225	0	0	0	0	0	0	0	0	8	184	23	9	282	31	174885	620	11125	39
** 50 to 99 employees	4	276	69	13946	51	1	5	5	0	0	0	0	0	0	0	0	4	276	69	49284	178	0	0
** 100 to 199 employees	1	129	129	8424	65	1	129	129	0	0	0	0	0	0	0	0	1	129	129	167888	1301	0	0
	189	1317	7	177028	134	22	246	11	3	69	23	102177	2840	167	680	4	220	1495	7	1089137	728	13184	8

VACATION PAY					TERM. PAY			SEVERANCE PAY					UNPAID WAGES			TOTAL					COLLECTED	
Num Cpy	Employees Total	Employees Avg	Amount Total	Due Avg	Num Cpy	Employees Total	Employees Avg	Num Cpy	Employees Total	Employees Avg	Amount Total	Due Avg	Num Cpy	Employees Total	Employees Avg	Num Cpy	Employees Total	Employees Avg	Amount Total	Due Avg	Amount Total	Col Avg
* Agriculture																						
** 0 to 9 employees																						
6	6	1	2447	408	0	0	0	0	0	0	0	0	3	3	1	6	6	1	2550	425	0	0
6	6	1	2447	408	0	0	0	0	0	0	0	0	3	3	1	6	6	1	2550	425	0	0
* Financial																						
** 0 to 9 employees																						
7	9	1	4301	478	4	3	1	0	0	0	0	0	9	10	1	9	10	1	21551	2155	0	0
7	9	1	4301	478	4	3	1	0	0	0	0	0	9	10	1	9	10	1	21551	2155	0	0
* Transport																						
** 0 to 9 employees																						
27	48	2	9013	188	1	1	1	0	0	0	0	0	16	16	1	27	51	2	19078	374	0	0
** 10 to 24 employees																						
4	52	13	3255	63	0	0	0	0	0	0	0	0	1	8	8	4	58	14	12442	215	0	0
** 25 to 49 employees																						
3	91	30	1369	15	0	0	0	0	0	0	0	0	3	9	3	3	91	30	37490	412	0	0
** 50 to 99 employees																						
1	90	90	5764	64	0	0	0	0	0	0	0	0	1	90	90	1	90	90	18942	210	0	0
** 100 to 199 employees																						
3	3	1	203	68	0	0	0	0	0	0	0	0	0	0	0	3	347	116	3588	10	0	0
38	284	7	19604	69	1	1	1	0	0	0	0	0	21	123	6	38	637	17	91540	144	0	0
* Manufacturing																						
** 0 to 9 employees																						
198	441	2	128864	292	75	158	2	0	0	0	0	0	149	290	2	209	489	2	409857	834	39441	58
** 10 to 24 employees																						
59	821	14	249376	303	40	459	11	1	21	21	77495	3687	28	281	10	61	853	14	865396	1014	21810	33
** 25 to 49 employees																						
22	767	35	361958	472	15	462	31	1	28	28	95987	3428	13	322	25	22	769	35	968717	1260	42241	55
** 50 to 99 employees																						
24	1707	71	706698	414	15	1212	81	14	561	40	2620848	4671	10	812	81	28	2053	73	6281112	3058	88878	45
** 100 to 199 employees																						
16	2341	146	888828	379	8	884	110	9	338	37	1087017	3584	7	475	68	16	2342	146	4121785	1760	67288	42
** 200 or more employees																						
9	2713	301	704283	260	4	669	167	2	200	100	180238	901	1	453	453	9	3155	351	2768181	877	223888	71
328	8880	27	3029580	341	163	3844	24	27	1148	42	4071131	3546	210	2513	12	345	9755	28	15880798	1586	516381	53
* Forestry & Mining																						
** 0 to 9 employees																						
18	32	2	3268	102	0	0	0	3	0	0	0	0	15	33	2	21	35	2	21351	610	0	0
** 10 to 24 employees																						
3	47	16	19600	417	0	0	0	0	0	0	0	0	0	0	0	3	47	16	19600	417	0	0
** 25 to 49 employees																						
4	47	12	8884	189	1	28	28	0	0	0	0	0	4	36	9	4	147	37	48827	332	0	0
25	126	5	31752	252	1	28	28	0	0	0	0	0	19	69	3	28	229	8	90278	394	0	0

—VACATION PAY—					—TERM. PAY—			—SEVERANCE PAY—					—UNPAID WAGES—			—TOTAL—					—COLLECTED—	
Num	Employees		Amount Due		Num	Employees		Num	Employees		Amount Due		Num	Employees		Num	Employees		Amount Due		Amount Col	
Cpy	Total	Avg	Total	Avg	Cpy	Total	Avg	Cpy	Total	Avg	Total	Avg	Cpy	Total	Avg	Cpy	Total	Avg	Total	Avg	Total	Avg
* Government & Non-Profit																						
** 0 to 9 employees																						
7	17	2	4385	258	1	4	4	0	0	0	0	0	1	10	10	7	17	2	9294	547	0	0
** 10 to 24 employees																						
3	69	23	32723	474	3	69	23	0	0	0	0	0	0	0	0	3	69	23	42307	613	21029	305
10	86	9	37108	431	4	73	18	0	0	0	0	0	1	10	10	10	86	9	51601	600	21029	245
* Other																						
** 0 to 9 employees																						
55	124	2	35278	284	27	49	2	0	0	0	0	0	46	89	2	65	152	2	166646	1096	5950	39
** 10 to 24 employees																						
10	161	16	19079	118	7	120	17	0	0	0	0	0	10	133	13	10	161	16	123150	765	0	0
** 25 to 49 employees																						
2	84	42	28392	338	1	2	2	0	0	0	0	0	1	35	35	2	84	42	50152	597	0	0
** 50 to 99 employees																						
3	166	55	4614	28	0	0	0	0	0	0	0	0	3	13	4	3	166	55	7559	46	7559	46
** 100 to 199 employees																						
5	857	171	300843	351	5	784	157	5	161	32	817817	3887	5	709	142	5	861	172	2173881	2525	955200	1109
75	1392	19	388206	279	40	955	24	5	161	32	817817	3887	65	979	15	85	1424	17	2521388	1771	968709	680
1451	18855	13	5098214	270	543	7898	15	43	1939	45	6903382	3529	1041	7541	7	1682	21050	13	26284448	1249	1757038	83

APPENDIX B
STATISTICAL BASIS FOR EMPLOYEE SAMPLING PLAN

It was explained in Section 2 that the numbers of employees sampled from each stratum was selected in such a way as to obtain a near-minimum variance estimator of total wages and benefits due all employees in all insolvencies reported to the Ministry of Labour during the twelve-month study period. This appendix explains how the numbers of employees to sample from each stratum was calculated.

Recall that each stratum was defined by the type of insolvency (of which there were three, bankruptcy, receivership or other), the type of company (of which there were eleven) and the size of company (of which there were six groups). Hence, there were 3x11x6 = 198 strata, although some strata were empty (e.g. there were no bankrupt financial companies having 200 or more employees.)

We define the following terms:

μ_i : the standard deviation of the total amount owed per employee in stratum i;
N_i : the number of employees in all insolvencies in stratum i;
n_i : the number of employees sampled from stratum i.
n : the total size of the sample.

The variance of the estimator of total wages and benefits owed in stratum i is:

$$N_i^2 \mu_i^2 / n_i \ .$$

Hence, the variance of the estimator of total wages and wage benefits in all strata combined is the sum of these individual variances across all strata. It can be shown that this overall variance is minimized by giving each sample size n_i the value:

$$n_i = [n][N_i\sigma_i/\sum_i N_i\sigma_i],$$

where the summation is done over all strata.

The number of employees in each stratum i, N_i, was known from the analysis of the summary records of insolvencies and the total size of the sample, n, was chosen to be 617. (Initially, this was slightly higher, but a few records were incomplete and therefore unusable.) Thus, only the variance for each stratum was needed to determine the optimal sample size for each stratum, using the above equation.

As in most statistical analyses, the variances for the strata were not known. Normally, either a pilot study is done to estimate the variances, or it is assumed that the variances are all equal, in which case the above equation simplifies to:

$$n_i = [n][N_i/\sum_i N_i],$$

which amounts to "proportional sampling".

In the present case, a pilot study was not justified. The approach taken, which could be expected to yield better estimates than proportional sampling, was to assume that the ratio of the mean to the standard deviation was the same for all strata. Under this assumption, the equation given at the top of this page reduces to:

$$n_i = [n][N_i\mu_i/\sum_i N_i\mu_i],$$

where μ_i is the mean of total wages and wages benefits per employee in stratum i.

Although the means were not known for each stratum, the analysis of the summary records provided close estimates of their values.

As an illustration of how this method was applied, consider the stratum corresponding to bankrupt manufacturing firms having 50 to 99 employees. It is seen from Table A-1 in Appendix A that the estimated total amount due employees of bankrupt manufacturing firms having 50-99 employees was $1,364,431. This is an estimate of the term $N_i \mu_i$ in the equation at the bottom of the previous page. The sum of these terms over all strata is found in the last row of Exhibit 4 to be $26,284,446. Hence,

$$(670)(1,364,131)/(26,284,446) = 35$$

employees were drawn at random from bankrupt manufacturing firms having 50-99 employees.

APPENDIX C
VARIANCES OF ESTIMATORS OF WAGES AND WAGE BENEFITS OWED AND OF AMOUNTS COLLECTED

Section 2 explained how the employee sample was used to derive estimates of total wages and benefits owed, and amounts collected, in each stratum, as well as distributions of these amounts per employee. It was also explained how these estimates were combined to produced corresponding estimates for larger groups of employees. In this appendix, we demonstrate how the variances of the estimated values were derived.

In each stratum, an unbiased estimate of the variance is given by:

$$[1-(n/N)][s^2],$$

where n is the sample size for the stratum, N is the total number of employees in the stratum (the term $[1-(n/N)]$ is a finite population correction factor) and s^2 is the sample variance, given by

$$[1/(n-1)][\sum y_j^2 - (\sum y_j/n)^2].$$

The variance of the estimate of the mean value in the stratum is simply this amount divided by n, the sample size. The estimate of total amounts due or collected in the stratum is N times the average amount due or collected per employee, as estimated from the sample. Hence, the variance of the estimate of the total amount due or collected in the sample equals N^2 times the variance of the mean, i.e.,

$[N^2/n][1-(n/N)][s^2]$.

The standard deviation of the estimate is simply the square root of the above quantity.

The estimated variances are summed across strata to derive variances of estimates of amounts due and collected for all employees of firms in specified groups of strata, such as all bankruptcies, all manufacturing firms or all firms having 25-49 employees.

APPENDIX V

INDIVIDUALS AND ASSOCIATIONS CONSULTED

INDIVIDUALS

William A. Bogart

Gary C. Grierson

Raymond Koskie, Q.C.

Dean Raymond Landry

R. Gordon Marantz, Q.C.

Derek Osler

James A. Renwick

Ron Robertson, Q.C.

John Varley

Prof. Paul C. Weiler,
Harvard Law School

Mark Zigler

ASSOCIATIONS

The Advisory Committee for the Ladies Cloak and Suit Industry

The Advisory Committe for the Ladies Dress and Sportswear Industry

Association of Canadian Financial Corporations

The Canadian Bankers Association

The Canadian Bar Association

Canadian Conference of Teamsters

ASSOCIATIONS (continued)

Canadian Federation of Independent Business

Canadian Insolvency Association

Canadian Labour Congress

Canadian Manufacturers' Association

Canadian Organization of Small Business

Canadian Union of Public Employees

The Clarkson Company Limited

Credit Union Central of Ontario

Department of Labour & Manpower, Government of Manitoba

Insurance Institute of Ontario

International Association of Machinists and Aerospace Workers

Ontario Chamber of Commerce

Ontario Federation of Labour

Ontario Insolvency Association

Provincial Building and Construction Trades Council of Ontario

Retail Council of Canada

Roynat